DOCTOR OF PHILOSOPHY

Has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales?

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Declaration

It is declared that:

(i) the candidate is the author of the thesis;
(ii) unless otherwise stated, all references cited have been consulted by the candidate;
(iii) the work of which the thesis is a record has been done by the candidate; and
(iv) it has not been previously accepted for a higher degree.

Samuel White
July 2021

Thesis Summary

This thesis addresses the question: Has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales? Using the example of the European Convention on Human Rights (ECHR), it asserts that for human rights instruments to achieve a high level of human rights protection for individuals in England and Wales, such instruments need to be incorporated. In doing so it makes use of a comparison of the English and Welsh courts' experience with incorporated and unincorporated human rights instruments.

It compares the ECHR, an example of an incorporated human rights instrument, and the International Covenant on Civil and Political Rights (ICCPR), an example of an unincorporated human rights instrument. It examines three periods of time to make direct comparisons of the enforcement of rights of two legal instruments containing similar rights in the courts England and Wales (prior to 1953, between 1953 and 1998, and between 1998 and 2018).

In each of these periods, this thesis carries out a doctrinal analysis of what the law on human rights in England and Wales was or is, providing clear explanation of how the law should operate in respect of individual rights. To complement this, quantitative socio-legal analysis shows what actually happened during this period: the vast increase in reference to international human rights law but the divergence between citations of the ECHR and ICCPR.

This thesis demonstrates the extent to which the ICCPR has not been used by the courts, compared with the increasing use of the ECHR. Indeed, between 1998 and 2018 the ECHR was referred to by courts 39 times more than the ICCPR. Although the increase in reference to the ICCPR after 1998 illustrates a growing awareness of, and willingness to engage with, international human rights law in domestic courts, the extent to which it lagged behind the ECHR serves to highlight the difference incorporation makes to the influence of such instruments.

This thesis concludes that incorporation of the ECHR secured better judicial enforcement of human rights in England and Wales.

Table of Abbreviations

AC	Appeals Cases
Admin LR	Administrative Law Reports
Admin	Administrative Division (of the High Court)
A-G	Attorney General
App No	Application Number
col	Column
Ch	Chancery Division (of the High Court)
ch	Chapter
chs	Chapters
civ	Civil Division (of the Court of Appeal)
CRAG	Constitutional Reform and Governance Act 2010
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	UN Economic and Social Council
ECR	European Court Reports
ed	Editor
edn	Edition
eds	Editors
EEC	European Economic Community
EHRR	European Human Rights Reports
EHRC	Equality and Human Rights Commission
ETS	European Treaty Series
EU	European Union
EWCA	Court of Appeal of England and Wales
EWHC	High Court of England and Wales
ex p	Ex Parte
fn	Footnote
HC	House of Commons
HL	House of Lords
HRA	Human Rights Act 1998
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic Social and Cultural Rights
ICR	Industrial Cases Reports
Imm AR	Immigration Appeals Reports
INLR	Immigration and Nationality Law Reports
IPPR	Institute for Public Policy Research
IRLR	Industrial Relations Law Reports
J	Justice
KB	Kings Bench
LJ	Lord Justice, Lady Justice
MR	Master of the Rolls
n	Note
No	Number
para	Paragraph
PC	Privy Council
Prtcl	Protocol
QB	Queen's Bench
s	Section
ss	Sections
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKHRR	United Kingdom Human Rights Reports
UKSC	United Kingdom Supreme Court
UN	United Nations
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
vol	Volume
WLR	Weekly Law Reports

Table of Authorities

International Instruments

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS 1

Treaty of Paris of 1856 (adopted 30 March 1856) 114 CTS 409

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A, UN Doc A/810

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331

UK Statutes and Statutory Instruments

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Hirst v UK (No 2) (2006) 42 EHRR 41

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UN Human Rights Committee

-- 'Report of the Human Rights Committee' (10 October 1991) UN Doc A/46/40

-- 'General Comment No. 28: Article 3 (The equality of rights between men and women)' (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10

-- 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13

-- 'Concluding observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc CCPR/C/GBR/CO/6

-- 'General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) UN Doc CCPR/C/GC/33

-- 'Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights' (22 November 2010) UN Doc CCPR/C/2009/1

-- 'Rules of Procedure of the Human Rights Committee' (11 January 2012) UN Doc CCPR/C/3/Rev.10

-- 'Seventh periodic reports of States parties due in July 2012: United Kingdom, the British Overseas Territories, the Crown Dependencies' (29 December 2012) UN Doc CCPR/C/GBR/7

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Canadian Charter of Rights and Freedoms 1982 (*Canada*)

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Non-UK Domestic Case Law

Kavanagh v Governor of Mountjoy Prison (2002) 3 IR 97 (Ireland)

1. Introduction

1.1 Introduction

This thesis answers the question: Has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales? It asserts that for human rights instruments to achieve a high level of human rights protection for individuals in England and Wales, such instruments need to be incorporated. In doing so, it uses a novel research method. This innovative method combines traditional doctrinal legal research with socio-legal research, drawing particularly on political science. It is based on a comparison of the courts' experience of an incorporated and an unincorporated human rights instrument.

This thesis uses the European Convention on Human Rights (ECHR)[1] as an example of an incorporated human rights instrument and the International Covenant on Civil and Political Rights (ICCPR)[2] as an example of an unincorporated human rights instrument. It examines three periods of time to compare the enforcement of the rights contained in these two instruments in England and Wales. By making a quantitative comparison of three periods this thesis clearly illustrates how changes in the law protecting human rights affected the courts' use of the ECHR, this is then compared with the use of the ICCPR. The three periods are:

1) before the ICCPR and ECHR entered into force, to understand how they changed the existing landscape (prior to 1953);
2) after the UK became party, but before either was incorporated into domestic law (from 1953 to 1998); and
3) after one was incorporated but the other not (1998 to 2018).[3]

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 22, generally referred to as the "European Convention on Human Rights".
[2] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[3] The cut-off date for case law in this thesis is the end of 2018, this is discussed in the methodology chapter, chapter 3.

As outlined in the methodology chapter, chapter 3, this thesis uses references to unincorporated treaties in the case law of England and Wales as a proxy for securing enforcement. In respect of the ICCPR, all the cases falling within the parameters have been examined to bolster the efficacy of this approach. This thesis shows that between 1953 and 1998 there were only six references to the ICCPR in reported judgments in England and Wales, compared with 64 references to the ECHR in the same courts. Between 1998 and 2018, the ECHR was referred to a total of 6,389 times whilst the ICCPR was only referred to 165 times, highlighting how little the ICCPR has been used compared with the ECHR.

In each of these periods, this thesis carries out a doctrinal analysis of what the law on human rights was or is, providing clear explanation of how the law should operate in respect of individual rights. To complement this, quantitative socio-legal analysis shows what actually happened during this period:[4] *viz*, the vast increase in reference to international human rights law but the divergence between citations of the ECHR and ICCPR. It highlights the extent to which the ECHR was used instead of the ICCPR, even before incorporation, and shows that aside from incorporation there is very little to justify such a vast divergence. Combining these approaches provides a fuller answer to the research question, going beyond black letter law to examine the real impact of international human rights instruments on the rights of individuals in England and Wales. In doing so, it provides a timely analysis of an important issue at the intersection of human rights law, constitutional law and international law.[5]

[4] This method is discussed in depth in chapter 3. In brief, this approach analyses the use of both instruments through statistical analysis allowing trends to be highlighted and linked to changes in the law. On socio-legal studies more generally, see, e.g., Bradney Anthony and Cownie Fiona, 'Socio-Legal Studies' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013).

[5] The timeliness is demonstrated *inter alia* by the work underway to reform the Human Rights Act 1998. Thus, the Conservative Party manifesto at the last election promised to "update" the Act: see Conservative Party, 'The Conservative and Unionist Party Manifesto 2019' (2019) <https://assets-global.websitefiles.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf> accessed 18 December 2020. The precise means by which it will be updated and the effect that will have on the existing framework has not yet been made clear. On 7 December 2020 an independent review into the operation of the Human Rights Act was announced by the UK Government. See, for information, <https://www.gov.uk/government/news/government-launches-independent-review-of-the-human-rights-act> accessed 18 December 2020.

This thesis demonstrates the extent to which the ICCPR has not been used by the courts of England and Wales, compared with the increasing use of the ECHR. Indeed, in the twenty years between 1998 and 2018 the ECHR was referred to by courts 39 times more than the ICCPR. Looking at the references to the ICCPR in greater depth also illustrates that during this period the courts did not develop a unique jurisprudence relating to the ICCPR in the same way they did with the ECHR. Although the increase in reference to the ICCPR after 1998 illustrates a growing awareness of, and willingness to engage with, international human rights law in the courts, the extent to which it lagged behind the ECHR serves to highlight how much difference incorporation appears to make to the influence of such instruments. This thesis concludes that incorporation of the ECHR secured significantly better enforcement of human rights in the courts of England and Wales.

1.2 Research Context

This research is situated at the confluence of several areas of law: international law, international human rights law, UK human rights law and UK constitutional law. Whilst a broad range of literature exists in this field, this thesis provides a genuinely new contribution to the existing scholarship on human rights law in England and Wales. The literature review, chapter 2, addresses this question in detail. This section aims to provide a brief overview of the existing literature and to illustrate how this thesis is situated within that landscape.

There exists a wide array of literature on international human rights instruments generally, and the ICCPR and ECHR specifically. In the general sphere, works such as those by Rehman and De Schutter provide an overview of international human rights law.[6] Similarly there are works which engage with international organisations' work with human rights, such as *The United Nations and Human Rights* edited by Philip Alston.[7] Whilst useful for understanding the wider picture surrounding the ICCPR and ECHR such works cannot answer the research

[6] Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Longman 2010); Olivier De Schutter, *International Human Rights Law* (2nd edn, Cambridge University Press 2014).
[7] Philip Alston (ed), *The United Nations and Human Rights* (Clarendon 1995).

question directly. More specifically, there are many works which examine the ICCPR and ECHR. For example, Joseph, Schultz and Castan's *The International Covenant on Civil and Political Rights* provides in-depth information on the ICCPR, but it does not address the UK individually or indeed the effect of international human rights instruments in domestic law.[8] Similarly, Rainey, Wicks and Ovey on the ECHR usefully gives an overview of the treaty but no national analysis.[9]

In addressing the research question, it is of note that there is very little literature which compares the ICCPR and ECHR.[10] Similarly, the scant literature on the ICCPR in the UK generally is largely out-of-date, such as Harris and Joseph's work *The International Covenant on Civil and Political Rights and United Kingdom Law*.[11] These and similar works provide useful information to inform the historic sections of this thesis but cannot help to address the more recent developments. That is to say, they tell us very little of the contemporary impact of the ICCPR on the development of domestic human rights law in England and Wales. Similarly, the historic works on the development of international human rights law, such as Simpson's *Human Rights and the End of Empire* and Bates' *The Evolution of the European Convention on Human Rights*, assist with the historic aspects of this thesis but cannot speak to the present situation.

At the domestic human rights law level, there is a range of works which can assist in one way or another. Thus, *Fenwick on Civil Liberties and Human Rights* and Hoffman and Rowe's *Human Rights in the UK* usefully give a doctrinal explanation of the law of human rights but do not address the ICCPR in a meaningful way.[12] This omission can perhaps be explained by the lack of

[8] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights* (2nd edn, Oxford University Press 2005).
[9] Bernadette Rainey, Elizabeth Wicks and Claire Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017).
[10] Schmidt is a rare exception, but this is now very much out-of-date: Markus Schmidt, 'The Complementarity of the Covenant and the European Convention on Human Rights – Recent Developments' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (2003 reprint, Clarendon 1995).
[11] David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (2003 reprint, Clarendon 1995).
[12] Helen Fenwick, *Fenwick on Civil Liberties and Human Rights* (5th edn, Routledge 2017); David Hoffman and John Rowe, *Human Rights in the UK* (3rd edn, Pearson Longman 2010).

knowledge in the UK about the ICCPR;[13] although, without detailed analysis of this issue it is impossible to be sure. Some works do address unincorporated treaties, such as the ICCPR, for example Clayton and Tomlinson's *The Law of Human Rights*.[14] Even then, though, they do not spend much time on this. Moreover, as the literature review illustrates, there is very little discussion of the ICCPR to be found in the journal literature on human rights law in England and Wales.[15]

There is much literature, covering a long period, regarding incorporation, but most of this was written before the incorporation of the ECHR into UK law by way of the Human Rights Act 1998, and does not address the ICCPR.[16] Similarly, the few works which employ some quantitative methods, such as Hunt's, which addresses the number of cases mentioning the ECHR, ICCPR and other international instruments, only do so up to 1997 and thus can only be used to inform part of the research question.[17]

To address the research question, it is necessary also to examine the constitutional framework of England and Wales. Much has been written on this topic, beginning with the two works which are usually regarded as the starting point of the study of constitutional law in England and Wales: those by Dicey and Bagehot.[18] Newer works, like Gardbaum's *The New Commonwealth Model of Constitutionalism*, address the model by which the ECHR has been incorporated

[13] The Human Rights Committee (HRC) has noted that the judiciary is not familiar with the ICCPR. UN Human Rights Committee 'Concluding observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc CCPR/C/GBR/CO/6, para 6. Given this lack of familiarity amongst the judiciary it seems likely that the same is true of academics and the legal profession.

[14] Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd edn, Oxford University Press 2009).

[15] See chapter 2, section 2.2.

[16] See, e.g., Lord Bingham, 'The European Convention on Human Rights: Time to Incorporate' in Richard Gordon and Richard Wilmot-Smith (eds), *Human Rights in the United Kingdom* (Oxford University Press 1996); Anthony Lester, 'Fundamental Rights: The United Kingdom Isolated?' [1984] Public Law 46; Leslie Scarman, *English Law – The New Dimension* (Stevens & Sons 1974).

[17] Murray Hunt, *Using Human Rights in English Courts* (Hart 1997).

[18] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th revised edn, first published 1885, Liberty Fund Incorporated 1982); Walter Bagehot, *The English Constitution* (first published 1867, Oxford University Press 2009).

into domestic law.[19] There are also works which usefully comment on the protection of human rights within England and Wales' constitutional structure, such as Jowell, Oliver and O'Cinneide's *The Changing Constitution*.[20] Similarly broad works include King's *The British Constitution* and Feldman's *English Public Law*.[21] Although such works are a vital starting point for answering the research question they address only the doctrinal aspect of this thesis and cannot help with the socio-legal analysis.[22]

Regarding the measurement of human rights, and the socio-legal aspects of this thesis, there exist a number of works which assist with this, mostly from other social-science subject areas. For example, Landman and Carvalho's work *Measuring Human Rights*, illustrates some approaches for measuring and assessing human rights.[23] Another such work is Simmons' text *Mobilizing for Human Rights*.[24] However, their use is limited by the fact that they do not provide methods of comparing the effect of different human rights instruments within a single country, and tend to focus on jurisdictions with much weaker rights protection than England and Wales. Within the field of law, works assessing the application of human rights include Hathaway's seminal paper 'Do Human Rights Treaties Make a Difference?'.[25] But, in common with the works from political science, this looks generally at human rights compliance rather than at one jurisdiction in particular.

Thus, whilst a wealth of literature exists in respect of many discrete areas of law relevant to this thesis, international human rights law (and the ECHR and ICCPR specifically), UK human rights law, UK constitutional law, and human rights

[19] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge University Press 2013).
[20] Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, Oxford University Press 2015). Particularly, Colm O'Cinneide, 'Human Rights and the UK Constitution' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, Oxford University Press 2015).
[21] Anthony King, *The British Constitution* (Oxford University Press 2007); David Feldman, *English Public Law* (2nd edn, Oxford University Press 2009).
[22] The methodology is discussed in chapter 3.
[23] Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge 2010).
[24] Beth Simmons, *Mobilizing for Human Rights* (Cambridge University Press 2009).
[25] Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935.

measurement, none of the existing literature directly addresses the question underlying this research. This thesis complements and contributes to the existing research. It builds on the existing, doctrinally focused literature to provide an analysis of human rights in England and Wales across three periods of time, and complements this by measuring the efficacy of rights enforcement by the courts within these time periods.

1.3 Research question

This thesis answers the question, has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales? It tests the hypothesis that incorporation allows the courts to enforce human rights more effectively and uniformly, delivering better outcomes for individuals seeking to enforce their rights. The research question itself raises a number of underlying questions, including:

- How best to demonstrate the differences brought about by incorporation?
- Which instruments should be compared in order to demonstrate this?
- How is the success of human rights enforcement assessed and measured?
- What external factors influence the enforceability of a particular instrument in England and Wales?
- How has England and Wales' regime of human rights protection worked historically, and what effect has incorporation had on this regime?

By virtue of the constraints on time and space available, the scope of this thesis has necessarily needed to be limited. Thus, this thesis focuses on England and Wales only rather than the UK more broadly. This allows for a more in-depth analysis of the changes and avoids the pitfalls of comparing differing legal systems (such as that in Scotland) and the unique history of Northern Ireland with

regard to human rights.[26] Additionally, the majority of the existing literature and case law is focused on England and Wales, further supporting this narrowing of jurisdiction. Although, as the statutory scheme of human rights protection extends to all part of the UK, the findings in this thesis remain relevant and useful to understanding the changes brought about by incorporation for the UK as a whole. Similarly, for the sake of the feasibility of the research, "courts" has been defined as the higher courts of England and Wales (that is, the High Court, the Court of Appeal, the Supreme Court, and its predecessor, the House of Lords).[27]

Further, "international human rights instrument" means a treaty which seeks to afford protection for human rights. In the context of this thesis the focus is on civil and political rights. For the purposes of this thesis "incorporation" means the transposition of international law into domestic law by way of a domestic legislative action. Finally, the phrase "significantly better enforcement" is taken to mean that in the majority of cases where an individual seeks to vindicate their rights in the face of violation by the state they are successful. This would correlate with fewer examples of the relevant treaty body finding rights violations.

This thesis examines only the textual provisions of the ICCPR and ECHR. This is because incorporation of the instruments into domestic law does not automatically mean that the law of the relevant treaty body or court becomes part of domestic law. Indeed, the courts of England and Wales have the power to interpret the Act of Parliament which incorporates the treaty as they would any other such statute.[28] Thus, this thesis does not address the development of the treaties through the decision-making of their treaty bodies.

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[26] In respect of Scottish human rights and constitutional law, see, e.g., Alan E Boyle (ed), *Human Rights and Scots Law* (Hart Publishing 2002); Alan Page, *Constitutional Law of Scotland* (W Green 2015); Robert Reed and Jim L Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* (4th edition, Bloomsbury Professional 2017). With regard to the unique history of human rights in Northern Ireland, see, e.g., Colin J Harvey (ed), *Human Rights, Equality, and Democratic Renewal in Northern Ireland* (Hart 2001); Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press 2012); Aoife Duffy, *Torture and Human Rights in Northern Ireland* (Routledge Taylor & Francis Group 2019).

[27] This also mirrors the definition of higher courts in the Human Rights Act in s 4.

[28] Although there may be a statutory requirement that the courts take account of the jurisprudence of the treaty body. This is the case, for example, with the case law of the of the European Court of Human Rights: by virtue of s 2 of the Human Rights Act the courts must "take into account" the Court's judgments when interpreting the ECHR. However, this does not require the courts to *follow* these decisions.

As well as defining some of the terms narrowly, this thesis makes a number of assumptions. For example, that the ECHR and ICCPR create equally binding human rights obligations in England and Wales. Furthermore, it assumes that a key test of the effectiveness of an international human rights regime at the domestic level is that the national courts can adjudicate on challenges brought against the state by individuals.

1.4 Contribution

This thesis makes a genuinely new contribution to the knowledge of the impact of incorporation on the enforcement of individual rights in England and Wales. The literature review illustrates that much literature exists in the areas covered by this thesis, but it also demonstrates that very little literature exists which examines the intersection of these areas.

The first contribution is the development of an innovative method which combines traditional doctrinal legal analysis with socio-legal approaches to the study of law. This method allows this thesis to address the research question in a new way, not only understanding what the law says in respect of human rights but also how the content of the law affects the outcomes for individuals. The methodology chapter of this thesis outlines the method in depth.[29] This new method complements existing research in the field of law, applying also new approaches from the field of socio-legal studies. This provides a more rounded understanding of how changes in the protection of human rights in England and Wales, such as involvement and engagement with international human rights treaties and incorporation, affect individual rights. Importantly, this method allows for further study in new periods of time, in other dualist jurisdictions, and applies equally to other rights, such as those usually grouped together as economic, social and cultural rights. This is particularly relevant given the increasing debate around the importance and protection of economic, social and cultural rights generally, which

[29] It is also outlined more briefly in section 1.5 of this chapter.

is also taking place in the England and Wales.[30] This method is well placed to make an important contribution to these and other debates on human rights protection.

The second contribution of this thesis is to the understanding of the development of human rights in England and Wales over time. As the literature review demonstrates, there is a wealth of literature which discusses human rights within England and Wales, and yet there are very few works which examine the evolution of human rights protection across more than a specific time period,[31] or a specific instrument.[32] Those which do provide a more broad overview are now outdated, such as Clayton and Tomlinson's work on human rights in England and Wales from 2009.[33] Thus, this thesis provides a new overview of the development of human rights protection in England and Wales from Magna Carta to the first twenty years of the Human Rights Act's existence.

In answering the research question, this thesis makes a third, important contribution, this time with regard to the ICCPR. There is a paucity of literature relating to the influence and use of the ICCPR in respect of human rights in the England and Wales. This thesis plugs that gap by examining all those cases in which the courts have referred to the ICCPR, some 171, and analysing the trends of this use. The last analysis of this kind was carried out in 1997 as part of a wider study of international human rights instruments in England and Wales prior to incorporation of the ECHR.[34] Thus, this thesis makes a major contribution to the

[30] For an overview see, e.g., Colm O'Cinneide, 'The European System' in Jackie Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2020). As well as Jackie Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2020) more generally. On recent work in the UK see, e.g., Koldo Casla and Peter Roderick, 'The UK Must Protect Economic and Social Rights with a New Law – Here's What Should Change' (*The Conversation*, 12 April 2019) <https://theconversation.com/the-uk-must-protect-economic-and-social-rights-with-a-new-law-heres-what-should-change-114523> accessed 18 December 2020.
[31] For an example of a work addressing a particular period of time or issue see, e.g., Keith Ewing and Conor Gearty, *Freedom under Thatcher* (Clarendon 1989); AW Brian Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Clarendon Press 1994). The former addresses the impact of the Thatcher government on human rights, the latter addresses the use of detention without trial in the Britain during the World Wars.
[32] For example, John Wadham and others, *Blackstone's Guide to the Human Rights Act 1998* (7th edn, Oxford University Press 2015).
[33] Clayton and Tomlinson (n 14).
[34] Hunt (n 17).

understanding of how the use of the ICCPR has been affected by non-incorporation and how this contrasts with the use of the ECHR across the same period.

Finally, this thesis makes an important contribution to the understanding of how incorporation impacts on the protection of human rights in the longer term. As the literature review illustrates, there are a number of works which engage with the early years after the Human Rights Act entered into force in 2000.[35] However, no detailed analysis of the impact of incorporation has taken place in recent years, and none of the existing studies have engaged with the impact of the incorporation of one instrument on another which provides different rights protection. Thus, this research contributes significantly to this area of knowledge, particularly at a time when the Human Rights Act is under such scrutiny. It provides data-driven information capable of contributing positively to the ongoing debate about the future of the Human Rights Act itself.[36]

Across these areas, the research carried out in this thesis makes a valuable contribution in an area which is both highly topical and politically important. In developing a new method, it provides a way of furthering the debate on how human rights in England and Wales are best protected and enforced; and in contributing to the understanding of how human rights have developed and been protected in England and Wales it contributes to a debate where many claims are made without reference to data or fact.[37]

[35] For example, Francesca Klug and Keir Starmer, 'Incorporation through the "Front Door": The First Year of the Human Rights Act' [2001] Public Law 654; Clayton and Tomlinson (n 14).
[36] The debate around the protection of human rights in the UK is discussed in Jacques Hartmann and Samuel White, 'The Alleged Backlash against Human Rights: Evidence from Denmark and the UK' in Kasey McCall Smith, Andrea Birdsall and Elisenda Casanas Adam (eds), *Human Rights in Times of Transition: Liberal Democracy and Challenges of National Security* (Edward Elgar 2020).
[37] Hartmann and White note that there is a potential link between education on human rights and public support. The research in this thesis can assist in contributing to that education by providing reliable data on the extent to which incorporation has improved human rights protection. See ibid.

1.5 Method & Layout

This thesis combines two methods of legal research in order to answer the research question. Use of the doctrinal method allows for an analysis of what the law says on a particular issue. Doctrinal research is where "the essential features of the legislation and case law are examined critically and then all the relevant elements are combined or synthesised to establish an arguably correct and complete statement of the law on the matter in hand."[38] It "lies at the basis of the common law and is the core legal research method."[39] As Hutchinson notes, "it can be argued that the lawyer needs to commence any legal discussion by using this method to critically determine 'what the law is'."[40] In analysing 'what the law is' across the three periods which will be examined, this thesis is able to illustrate the changes which have taken place over time.

Doctrinal research alone, however, cannot answer the research question and so this thesis also employs methods from the field of socio-legal research. This allows the law to be contextualised, and for measurable, quantitative data to be gathered and analysed in order to assess the impact of incorporation on rights protection. Cownie and Bradney note that "Socio-legal studies is hard to define because of the diverse range of scholarship carried out under that name".[41] Harris suggests that socio-legal studies should be interpreted broadly, and this approach is adopted in this thesis.[42] Here, methods from the sphere of politics and international relations are adopted to gather quantitative data which permits a comparative analysis which is not possible with traditional legal methods.

An overview of this thesis outlines how these methods will be applied to answer the research question. The literature review in chapter 2 explains the landscape

[38] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 13.
[39] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 85.
[40] Hutchinson (n 38) 39.
[41] Fiona Cownie and Anthony Bradney, 'Socio-Legal Studies' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2018) 42.
[42] DR Harris, 'The Development of Socio-Legal Studies in the United Kingdom' [1983] Legal Studies 315, 315.

in which this research is situated, and the methodology in chapter 3 provides a detailed outline of how this research will be carried out.

The first substantive chapter, chapter 4, provides an overview of the development of international human rights law. It also examines the ECHR and ICCPR from a doctrinal perspective, it also justifies their comparison for the purposes of this research. The chapter analyses both treaties. It looks at the rights protected and the differences between the two instruments, looking at the text of the treaties. There is a wide body of work drawn on to carry out doctrinal research in this area. The chapter illustrates that the comparison of the ICCPR and ECHR is purposeful and constructive, and that it assists in answering the research question. The next chapter, chapter 5, analyses the proposition that incorporation should not make a difference to rights protection as a matter of international law. In common with the chapter on international human rights instruments, chapter 4, it employs the doctrinal method to carry out this analysis. This chapter serves to explain the interaction between domestic law and international law in England and Wales. The nature of this interaction is the reason why incorporation in necessary to make rights in international instruments enforceable in domestic law.

The next chapters examine three periods of time. Chapter 6, prior to 1953, the year in which the ECHR entered into force; chapter 7, between 1953 and 1998, with both the ECHR and ICCPR in force but before the Human Rights Act; and, chapter 8, from 1998 to 2018, the period after the Human Rights Act received royal assent. This allows for the creation of a baseline prior to either treaty, then a comparison of the use of the ICCPR and ECHR in England and Wales and, finally, an examination of their use in the courts after the incorporation of the ECHR.

Chapter 6 uses doctrinal research to provide a snapshot of the state of human rights in England and Wales prior to the ECHR and ICCPR. This chapter provides a baseline against which to examine the developments which resulted following the UK becoming party to both treaties and their entry into force by giving an outline of what the law was at that time. As neither treaty had entered into force during the first period under review (prior to 1953) no quantitative analysis takes

place in this chapter. Similarly, chapter 7 applies doctrinal research to demonstrate the effect of the ECHR on UK human rights law in the second period under review, *viz* prior to the Human Rights Act in 1998, and to compare it to the ICCPR. It gauges the changes brought about in the protection of human rights under these treaties while they operated only at the international level. Chapter 7 looks at the courts' use of both the treaties in their judgments as well as the number of violations found by the European Court of Human Rights (ECtHR) against the UK during this period.[43] The comments of the Human Rights Committee (HRC) during its periodic reviews of the UK during this period will also be examined to provide comparator. Chapter 8 applies the methods used in chapter 7 to analyse the third period under review: that is, the period after incorporation in 1998. The use of the same method allows for a direct comparison to be drawn between the pre- and post-incorporation eras and how the use of the ECHR differed in these periods, as well as benchmarking the trends seen from the ECtHR judgments. Once again, these will be compared with use of the ICCPR and the views of the HRC during this period.

In chapter 9, the data from the previous chapters is collated and analysed side-by-side. This is done to show that incorporation of the European Convention of Human Rights appears to have led to better outcomes for those seeking to enforce their human rights in the courts in England and Wales, and, thus, that it has allowed the courts to provide better protection of human rights. It also serves to highlight that this research comes at an important time for the development of human rights in England and Wales, and the UK as a whole, as there is now a very active debate on the future of the protection of human rights and the possible repeal or change of the Human Rights Act. This demonstrates how the findings of this research will be built upon to enhance the understanding of the effect of incorporation on domestic human rights protection in England and Wales.

[43] An equivalent measure is not available under the ICCPR as the UK has not accepted the right to individual petition under Optional Protocol 1. This data in not available at the level of the constituent nations of the UK.

1.6 Findings

The research carried out in this thesis enables a number of findings to be made in answer to the research question. In respect of the years between 1953 and 1998 (chapter 7), it serves to illustrate that the post-war human rights movement, and the instruments which resulted from it, in this case the ECHR (and ICCPR), improved human rights protection in England and Wales. As is shown in chapter 7, the UK's membership of the ECHR correlated with a shift from the negative, liberties-based approach to rights which had predominated before that point. In its place, the courts of England and Wales became increasingly willing to make reference to unincorporated human rights instruments, albeit in certain circumstances.[44] This use of the ECHR to clarify ambiguity or to inform the exercise of discretion increased in the 1980s and 1990s. By 1997, commentators such as Klug and Starmer were questioning whether the ECHR had been incorporated "through the back door".[45] Nonetheless, prior to the Human Rights Act, the rights protected by the ECHR were not actionable in the courts of England and Wales. By comparison, during this same period the ICCPR was mentioned in judgments by the courts. However, it was only referred to on six occasions, suggesting that it was far less central to judges' reasoning on human rights, and making it difficult to draw many conclusions about the courts' engagement with the ICCPR itself.

Whilst the use of the ECHR was arguably gaining traction in England and Wales prior to the Human Rights Act 1998, this period also saw an increasing trend of the ECtHR finding the UK in violation of its international obligations to protect the ECHR rights. This trend serves to suggest that whilst the courts were seeking to use the ECHR more widely, they were unable to remedy all instances of rights infringement. Thus, the first finding is: **that it is possible for the courts in England and Wales to make use of unincorporated instruments to protect**

[44] Such as where there was an ambiguity in statute. See *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, in particular at 143, per Diplock LJ.
[45] Francesca Klug and Keir Starmer, 'Incorporation Through the Back Door?' [1997] Public Law 223.

human rights. However, this protection does not appear to have been particularly effective in all cases.

A second finding pertains to the relationship between incorporation of one instrument and the use of another. As was noted above, prior to the Human Rights Act, the ICCPR was only referred to in six judgments in England and Wales. In the period between 1998 and 2018 the number of references increased almost thirty-fold to 165. This may well result from increased rights awareness and knowledge amongst litigants and their legal advisers. But, whilst awareness and use of the ICCPR increased, in only a minority of those 165 cases (25) did the court engage with the content of the ICCPR in some way as part of their reasoning. Thus, the second finding is: **there appears to be a correlation between incorporating one human rights instrument and an increase in references to others, suggesting that incorporation improves rights literacy and knowledge more widely than simply in relation to the instrument which is incorporated. Nevertheless, such an increase does not improve the effectiveness of unincorporated instruments as a means of rights protection alongside the incorporated instrument.**

As was highlighted above, the period prior to the Human Rights Act saw an increase in the number of cases in which the ECtHR found the UK in violation of its duties under the ECHR. Indeed, this trend developed from the point at which the UK accepted the right of those in the UK to petition the ECtHR directly and there was a steady trend of increasing adverse judgments against the UK between 1975 and 1998. By contrast, in the period after the Human Rights Act there has been a trend in the opposite direction with increasingly few judgments of the ECtHR finding against the UK. Therefore, the third finding is: **that incorporation of the ECHR correlates with an improved track record before the ECtHR.**

Taken together these findings help answer the underlying research question by suggesting that incorporation links directly with better human rights protection. In particular, it appears that the incorporation of the ECHR by way of the Human Rights Act has allowed the courts of England and Wales to provide significantly

better protection of human rights. This finding is supported by the fact that there have been increasingly few findings of violation against the UK by the ECtHR since the Human Rights Act and the clear case law showing the courts using the powers granted to them by the Act to protect human rights. By contrast, the ICCPR has not fared as well. Whilst it does seem clear that the incorporation of the ECHR has led to greater rights awareness and literacy, this has not translated into the judiciary in England and Wales being willing to use the ICCPR as part of their decision-making to further the rights it protects over and above those in the ECHR. Moreover, the observations of the HRC in response to the UK's submissions as part of the periodic reporting process serve to show that the HRC remains concerned that the rights secured by the ICCPR are not enforceable in all parts of the UK. Indeed, the HRC particularly highlights that notwithstanding the Human Rights Act there remain ICCPR rights which are unprotected in England and Wales. Thus, this thesis concludes: **that incorporation of the ECHR has secured better judicial enforcement of human rights in England and Wales.**

2. Literature Review

2.1 Introduction

This chapter demonstrates that the research undertaken in this thesis provides a genuinely new contribution to the existing scholarship on human rights law in England and Wales. It also highlights that this research contributes to the understanding of domestic law in the context of its interaction with international law, as well as international human rights law generally and on the ECHR and ICCPR specifically. In order to do so, it aims to frame the context of this thesis, and its underlying research question, by providing an overview of the existing literature and situating this research within that literature. This chapter will demonstrate that the research question (*viz*, has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales?) is not something which has been adequately addressed in existing research, and certainly not with the benefit of nearly two decades' hindsight.

This chapter first examines the existing literature in the fields of international human rights law,[1] domestic human rights law, and constitutional law of England and Wales. Section 2.2 of the chapter will show that, whilst there is a plethora of literature on both domestic and international human rights law, there is limited literature which examines the intersection of these areas. Thus, the ECHR and ICCPR have been addressed in much writing from an international perspective, there are many works on domestic human rights law and constitutional law, but there are few works which examine, for example, the effect of the constitution on the UK's compliance with human rights treaty obligations. Moreover, this literature review will show that the existing literature does not provide a quantitative analysis of the enforcement of the human rights regime in England and Wales, something this thesis will address. Rather, the existing literature is based on doctrinal analysis of what the law says. By contrast, this thesis seeks to combine doctrinal analysis with socio-legal methods, which aim to complement the existing

[1] Focusing on the ECHR and comparing this with the ICCPR.

doctrinal research by providing a robust quantitative assessment of the impact of incorporation. This thesis will for the first time assess the impact of incorporation of an international human rights treaty on human rights in England and Wales by combining doctrinal analysis of what the law says with quantitative socio-legal analysis showing the impact of the changes in law for human rights protection.[2] This section of the chapter will also contain a brief examination of the existing literature in relation to measuring the impact of human rights instruments. This will demonstrate that the existing methods for measuring human rights are not designed for assessing the enforcement of an international human rights instrument in an individual country, or a jurisdiction within an individual country, and thus cannot be used in order to answer the question underlying this thesis.

Next, this chapter will place this thesis, and its underlying research question, within the context of the existing literature to show that it addresses a previously under-researched question. In particular this will address the fact that no systematic survey of the impact of incorporation on the protection of international human rights instruments in England and Wales has been carried out to date. It will also highlight that, although the literature on measuring human rights does not provide an explicit measurement system for human rights attainment within a single state, the existing methods of measuring human rights are adaptable and can be used to provide a basis for answering the research question underlying this thesis. Finally, the conclusion of this chapter will illustrate how this literature review will be used to inform and develop the methodology underlying this thesis in order to answer the research question.

2.1.1 Literature review methodology

As Boote and Beile note, “A substantive, thorough, sophisticated literature review is a condition for doing substantive, thorough, sophisticated research.”[3] Thus, “a

[2] For a more detailed examination of what is meant by doctrinal analysis see chapter 3 of this thesis, which addresses method.

[3] David N Boote and Penny Beile, ‘Scholars Before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation’ (2005) 34 Educational Researcher 3, 3.

researcher or scholar needs to understand what has been done before, strengths and weaknesses of existing studies, and what they might mean."[4]

In providing a substantive, thorough and sophisticated literature review, this thesis adopts two methods: narrative and systematic. There are a number of types of narrative review, but the type most relevant to this thesis is a general narrative review. This seeks to provides an overview of the key aspects of the current knowledge of the topic.[5] It is intended to form the introduction to the thesis and is defined by the research question underlying this thesis. This style of literature review was chosen given the broad literature which exists across the areas under examination (*viz* domestic and international human rights law, constitutional law and human rights measurement) and the large time period under examination (from pre-1953 to 2018), both of which would render a truly systematic review of the literature impossible in the time available. Nonetheless, this review aims to highlight the breadth of literature which has been written, as well to illustrate the fact that there is a clear gap in knowledge to which this thesis will provide an answer.

In selecting the works highlighted in this review, a number of questions were considered, including:

- What academic material has been published in the areas of international human rights law, domestic human rights law, constitutional law, and the measurement of human rights?
- Who are the eminent scholars in this field?
- Do these works examine England and Wales?
- What research methods have been used in the measurement of human rights?
- What were the advantages or disadvantages of those methods?

[4] ibid.
[5] Anthony J Onwuegbuzie and Rebecca Frels, *7 Steps to a Comprehensive Literature Review: A Multimodal and Cultural Approach* (Sage 2016) 24–25.

In further narrowing down the list these questions helped produce, another factor for consideration was the need to provide a balanced overview by including commentators from different institutions and backgrounds and a broad range of sources. Whilst this literature review does not aim to be an exhaustive list of what has been written, it does aim to provide a representative overview of the literature in the relevant areas.

Complementing this narrative review, a systematic review also took place. A systematic review is designed to identify, select, and critically appraise the literature in order to answer a specific question. It aims to be specific and replicable. This review examined the recent journal literature in relation to human rights in England and Wales to examine whether, and if so to what extent, incorporation and the ICCPR featured in recent scholarship in this field. Five leading journals were selected: Public Law, the European Human Rights Law Review, the Oxford Journal of Legal Studies, the Cambridge Law Journal, and the Modern Law Review. It examined all articles relating to human rights in England and Wales in these journals between 2013 and 2018.[6] This period was selected to provide a snapshot of the literature published in the five years prior to the thesis cut-off. This selection encompassed a broad range of research styles and specialisms and demonstrated clearly that no work has been published in these outlets which overlaps with the research being undertaken in this thesis. Indeed, it showed that nothing at all had been published on the ICCPR during this period and that surprisingly little had been published on the Human Rights Act.[7]

2.2 Existing Literature

This section of the chapter provides an overview of the literature which currently exists in the fields of legal study relevant to this thesis. That is, international

[6] In order to assess whether an article considered human rights, the review made use of the subject tags on both Westlaw and LexisNexis, the date range was narrowed down to the period under review and each journal was searched in turn. The date range was chosen as it covered the five years prior to the cut-off point of this thesis.

[7] Indeed, across these five journals, over five years, fewer than 10 articles had been written focusing on the Human Rights Act.

human rights law (generally, and relating to the ECHR and ICCPR specifically), domestic human rights law, constitutional law, and human rights measurement. It highlights a number of works within each sphere and assesses whether they provide a comparable analysis of the law to that proposed by this thesis. In doing so, this section will demonstrate that although there is a wide range of literature which is relevant to this thesis, and which can inform sections of it, the question to be answered by this thesis has not been addressed in the existing literature in the field.

2.2.1 International human rights

A very wide range of literature exists in relation to international human rights instruments generally, and the ICCPR and ECHR specifically. In the general sphere, works such as those by Rehman and De Schutter provide a global overview of international human rights, which is vital to the chapter of this thesis which addresses the international human rights movement.[8] Also at the general level are works looking at specific international organisations, such as the UN, through the lens of human rights, such as, for example *The United Nations and Human Rights* edited by Philip Alston.[9] Beyond this, however, such works are of limited use to this thesis as they cannot be used to provide detailed analysis of the operation of international human rights law within the UK itself. Rehman's *International Human Rights Law*, for example, covers a significant breadth of subject matter, from the Universal Declaration on Human Rights (UDHR) to the Inter-American Court of Human Rights, but does not provide more than an overview of any topic. This is useful for the purposes of background but cannot answer the research question posed in this thesis.[10]

[8] Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Longman 2010); Olivier De Schutter, *International Human Rights Law* (2nd edn, Cambridge University Press 2014).
[9] Philip Alston (ed), *The United Nations and Human Rights* (Clarendon 1995).
[10] Other works in this category include Michael Haas, *International Human Rights: A Comprehensive Introduction* (Routledge 2008). These are complemented by older works such as Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950); Hersch Lauterpacht, *An International Bill of the Rights of Man* (first published 1945, Oxford University Press 2013).

Beyond this kind of generalist text, many works explore individual treaties, and those bodies which monitor their enforcement and continuing operation, rather than the effect which a particular treaty has on a particular jurisdiction. For example, in relation to the ICCPR**,** Joseph, Schultz and Castan's *The International Covenant on Civil and Political Rights* provides a wealth of information on the ICCPR, the rights it protects and its enforcement mechanisms.[11] However, it does not provide any method of assessing whether an individual nation or jurisdiction, such as England and Wales, is compliant with its obligations under the treaty. Likewise, books such as Rainey, Wicks and Ovey on the ECHR provide a similar, and similarly detailed, overview of the treaty, its content and enforcement mechanisms, without providing a country-by-country analysis.[12] These works do, however, provide valuable information which can be used to address the research question, for example, on the content of the treaties, and the way in which these treaties are overseen and enforced.

Importantly also for this thesis, little literature exists which examines the ICCPR and ECHR in relation to one another. As is discussed in chapter 4, both the ICCPR and ECHR share a common ancestor in the Universal Declaration on Human Rights (UDHR);[13] whilst there is a wealth of literature which addresses the UDHR itself, and the effect it has had on the development of the international human rights movement, these works, such as Baderin and Ssenyonjo's *International Human Rights Law: Six Decades after the UDHR and Beyond* do not directly compare ECHR and ICCPR.[14] These works do, however, contain useful discussion of the current operation of the ICCPR and ECHR, providing practical analysis of the current state of these treaties and their application.

What literature there is in relation to the ICCPR and England and Wales is outdated. Harris' and Joseph's work *The International Covenant on Civil and*

[11] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights* (2nd edn, Oxford University Press 2005).
[12] Bernadette Rainey, Elizabeth Wicks and Claire Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017).
[13] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A, UN Doc A/810.
[14] Mashood Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010).

Political Rights and United Kingdom Law, for example, is now some 24 years old and many of the observations are no longer as relevant to the English and Welsh experience as they were at the time of publication.[15] This is particularly true of Schmidt's chapter in Harris and Joseph' work comparing the ICCPR and ECHR in the UK context, which does not take into consideration the development of the ECHR in England and Wales, particularly since incorporation.[16] Such works are useful for the historic sections of this thesis as they provide an analysis of the state of the law at a particular time; however, they cannot speak to the developments which have taken place over the intervening years.

In addition to this, there are numerous works available in relation to the history and development of the international human rights movement generally, and certain treaties specifically, which can be drawn on for this thesis. One example of a more general text in this area is Simpson's magisterial *Human Rights and the End of Empire* which provides a detailed overview of the emergence of international human rights treaties and their development.[17] A more targeted text is Bates' work on the development of the ECHR, which traces the drafting of the ECHR, and examines the motives and history behind it.[18] Both texts again provide useful information which can contribute to a doctrinal analysis of both treaties. There are also shorter articles which provide useful information in this connection, such as those by Burgers and Buergenthal on general international human rights law, and Nichol and O'Boyle on the ECHR.[19]

[15] David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (2003 reprint, Clarendon 1995).
[16] Markus Schmidt, 'The Complementarity of the Covenant and the European Convention on Human Rights – Recent Developments' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon 1995).
[17] AW Brian Simpson, *Human Rights and the End of Empire* (Oxford University Press 2001).
[18] Ed Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press 2010). Such works also draw heavily on detailed technical works such as Council of Europe (ed), *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, (Martinus Nijhoff 1975).
[19] Jan Herman Burgers, 'The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century' (1992) 14 Human Rights Quarterly 447; Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 American Journal of International Law 783; Danny Nicol, 'Original Intent and the European Convention on Human Rights' [2005] Public Law 152; Michael O'Boyle, 'On Reforming the Operation of the European Court of Human Rights' [2008] European Human Rights Law Review 1.

Beyond this, the journal-based literature is also helpful in providing doctrinal analysis of the state of the law at various points in the histories of these, and other, international human rights instruments. Such works are, however, limited in their relevance to this research as they cannot answer questions on the quantitative measurement of the application of these treaties in the context of England and Wales.

2.2.2 Domestic human rights law

Similarly, those works which relate to the status of human rights law in England and Wales are heavily, or exclusively, focused on the doctrinal analysis of what the law says in relation to human rights, rather than on how this operates. Importantly, works such as *Fenwick on Civil Liberties and Human Rights* and Hoffamn and Rowe's *Human Rights in the UK* not only focus on the doctrinal analysis of the law, but also largely ignore the ICCPR and other international human rights instruments.[20] There are other useful texts which look more broadly at human rights, including examining treaties to which the UK is party but has not incorporated, for example Clayton and Tomlinson's *The Law of Human Rights*.[21] However, this is now a decade out-of-date and, moreover, whilst treaties such as the ICCPR are addressed, they are not covered in significant detail.

In the English and Welsh context also, there is little literature on the ICCPR to be found in leading human rights and public law journals. A search of articles referring to the ICCPR in the law of England and Wales highlights that where the ICCPR is mentioned it tends to be in passing, or as an afterthought, rather than being addressed in any significant detail.[22] A rare exception is Klug, Starmer and

[20] Helen Fenwick, *Fenwick on Civil Liberties and Human Rights* (5th edn, Routledge 2017); David Hoffman and John Rowe, *Human Rights in the UK* (3rd edn, Pearson Longman 2010). See also works such as Michael Tugendhat, *Liberty Intact* (Oxford University Press 2016); David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press 2002); Christopher McCrudden and Gerald Chambers (eds), *Individual Rights and the Law in Britain* (Clarendon Press 1994); Gordon Slynn, 'The Development of Human Rights in the United Kingdom' (2004) 28 Fordham International Law Journal 477.

[21] Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd edn, Oxford University Press 2009).

[22] Using a journal article search on Westlaw which addressed the topic "human rights" looking for full text articles relating to England and Wales prior to 9 November 2018 which used the exact

Weir's paper on the ICCPR and the UK, although, tellingly, the ICCPR's full name is given incorrectly in the title of the piece.[23] This paper, too, is now rather out-of-date and pre-dates the Human Rights Act.

In relation to incorporation, there is a significant body of literature which extends over a number of decades, however, this body of work almost exclusively pre-dates the incorporation of the ECHR by way of the Human Rights Act 1998.[24] Whilst useful for sections of the thesis discussing the period before 1998, works such as Bingham's on the need for incorporation say little about the impact of incorporation on the UK's ability to protect human rights.[25] This is also the case in respect of the few quantitative works, such as Hunt's, which address the number of cases mentioning the ECHR, ICCPR and other international instruments but only do so up to 1997 and thus can only be used to inform part of the research question.[26] Moreover, those works which do post-date the Human Rights Act are largely focused on its early years. Therefore, again, these are of little use in assessing the overall impact which incorporation has had on human rights enforcement by the courts in England and Wales. One such example is Klug's paper on the first year of the Human Rights Act being in force.[27]

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phrase "International Covenant on Civil and Political Rights", it was noted that only 219 full text articles were available, and the vast majority of these articles made only one mention of the ICCPR. This became 265 when abstract only articles were included.

[23] Francesca Klug, Keir Starmer and Stuart Weir, 'The British Way of Doing Things: The United Kingdom and the International Covenant of Civil and Political Rights, 1976-94' [1995] Public Law 504.

[24] See, e.g., Lord Bingham, 'The European Convention on Human Rights: Time to Incorporate' in Richard Gordon and Richard Wilmot-Smith (eds), *Human Rights in the United Kingdom* (Oxford University Press 1996); Francesca Klug and Keir Starmer, 'Incorporation Through the Back Door?' [1997] Public Law 223; Francesca Klug and John Wadham, 'The "Democratic" Entrenchment of a Bill of Rights: Liberty's Proposals' [1993] Public Law 579; Home Department, *Rights Brought Home: The Human Rights Bill* (1997); Anthony Lester, 'Fundamental Rights: The United Kingdom Isolated?' [1984] Public Law 46; Leslie Scarman, *English Law – The New Dimension* (Stevens & Sons 1974).

[25] Bingham (n 24).

[26] Murray Hunt, *Using Human Rights in English Courts* (Hart 1997). Other works, such as the study carried out by the Equalities and Human Rights Commission provide limited data on the first decade after the Human Rights Act: Alice Donald, Jane Gordon and Philip Leach, *Research Report 83: The UK and the European Court of Human Rights* (Equality and Human Rights Commission 2012).

[27] Francesca Klug, 'Incorporation through the "Front Door": The First Year of the Human Rights Act' [2001] PL 654.

2.2.3 Constitutional law

In common with the existing literature on human rights in England and Wales, there is a wealth of written material on the UK's constitution as it operates in England and Wales. This literature is relevant to this thesis as it is the UK's dualist constitutional structure, requiring an international instrument to be incorporated into domestic law in order to be effective at a domestic level, which, in part, gives rise to the thesis question. In the UK setting it is essential to explore academic writings in order to understand the constitution, as the uncodified constitutional structure means that there is no convenient written document. The two works which are the traditional starting point in constitutional law, particularly in the context of England and Wales, are those by Dicey and Bagehot.[28] These are of limited applicability as both significantly pre-date the post-World War Two expansion of international human rights law, and thus have little to say on the question under investigation. Nevertheless, they are still two of the key texts in understanding the UK's constitutional structure which impacts on the way in which human rights have developed in England and Wales and thus still merit inclusion and discussion.

More recent literature, such as Gardbaum's *The New Commonwealth Model of Constitutionalism*, seeks to address the way in which the UK's constitutional framework attempts to manage the protection of human rights in the face of the doctrine of parliamentary sovereignty.[29] Gardbaum's work, however, is of limited relevance to this thesis as the research question focuses on the outcomes of this model of human rights protection, rather than the method of protection itself.

Outside these examples, there is a range of general literature on the UK's constitutional law which is useful in providing a grounding for the earlier chapters of this thesis. For example, this literature underpins chapter 5 which examines

[28] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th revised edn, first published 1885, Liberty Fund Incorporated 1982); Walter Bagehot, *The English Constitution* (first published 1867, Oxford University Press 2009).

[29] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge University Press 2013). There are also other works in this area but, again, in common with Gardbaum's work, these do not address the outcomes of the various models of human rights protection.

the relationship between constitutional law and international law in England and Wales.[30] Examples in the field include Jowell, Oliver and O'Cinneide's *The Changing Constitution*,[31] which provides specific commentary on issues such as human rights within the UK's constitutional framework.[32] Similarly broad works include King's *The British Constitution* and Feldman's *English Public Law*.[33] However, once again, these works, whilst providing a useful platform from which to start, are limited in their usefulness by their adherence to the doctrinal approach and can only assist inasmuch as they contribute to the doctrinal elements of this thesis.[34]

2.2.4 Human rights measurement

The final area which needs to be addressed in this literature review is the range of work in relation to measuring human rights. It is this area which will have the greatest relevance to the socio-legal research to be carried out in this thesis. There are few texts from legal scholars which examine this field, and the majority of this work emanates from other disciplines within the social sciences, most notably politics.

A leading example in this area is Landman and Carvalho's work *Measuring Human Rights*, which provides a number of methods for assessing and

[30] In this connection, papers such as Roger O'Keefe, 'The Doctrine of Incorporation Revisited' (2008) 79 British Yearbook of International Law 7 are particularly useful.
[31] Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, Oxford University Press 2015).
[32] Colm O'Cinneide, 'Human Rights and the UK Constitution' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, Oxford University Press 2015). As do articles such as Douglas W Vick, 'The Human Rights Act and the British Constitution' (2002) 39 Texas International Law Journal 329; Paul Bowen, 'Does the Renaissance of Common Law Rights Mean That the Human Rights Act 1998 Is Now Unnecessary?' [2016] European Human Rights Law Review 361; TRS Allan, 'Constitutional Rights and Common Law' (1991) 11 Oxford Journal of Legal Studies 453; Anthony Lester, 'Fundamental Rights in the United Kingdom: The Law and the British Constitution' (1976) 125 University of Pennsylvania Law Review 337.
[33] Anthony King, *The British Constitution* (Oxford University Press 2007); David Feldman, *English Public Law* (2nd edn, Oxford University Press 2009).
[34] For more detail on the application of both the doctrinal and socio-legal methods to this thesis see chapter 3. There is a range of useful literature on this topic, for example, Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018); Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017); DR Harris, 'The Development of Socio-Legal Studies in the United Kingdom' [1983] Legal Studies 315; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 85.

measuring the implementation of human rights at various levels.[35] Similarly, Simmons' text *Mobilizing for Human Rights* addresses the issue of assessing the success of the protection offered by human rights regimes.[36] Both these works are from the political science sphere but lend themselves to the kind of analysis required by the socio-legal aspects of this thesis. One limitation, however, present in both texts, is that the types of analysis envisaged and outlined in both works are addressed towards global measures rather than individual countries or jurisdictions (such as England and Wales), or are targeted at countries which have poor human rights standards. Many of these examples build on scales, such as the Freedom House index, where the UK traditionally performs well. This means that these approaches need to be adapted to fit the research required for this thesis.

One example of an academic within law seeking to measure the application of human rights is Hathaway's seminal paper 'Do Human Rights Treaties Make a Difference?'.[37] In this paper, Hathaway provides detail on a range of rational actor and normative models of compliance with human rights treaties, before looking at compliance with certain human rights protections, such as those against genocide and torture, or protections for women's political equality. However, Hathaway's study is broad in the range of rights instruments it examines, and narrow in the rights it analyses; by comparison, this thesis looks in greater detail at two instruments and in the context of a single country. Similarly, to the works by Landman and Carvalho, and Simmons, however, Hathaway's paper takes a much more general approach than that envisaged in this thesis, looking at compliance with a number of international standards by a broad range of states. Such international standards and measures do not provide the data required to answer the research question underlying this thesis and often do not provide sufficient data on countries which have better records of human rights protection, such as the UK. Thus, the existing literature looks at the impact of human rights from a broad perspective and very little literature seems to take a narrower

[35] Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge 2010). This work is discussed in more detail within the methodology chapter of this thesis.
[36] Beth Simmons, *Mobilizing for Human Rights* (Cambridge University Press 2009).
[37] Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935.

approach, focusing on an individual country or specific rights instrument. Nor does the existing literature seek to combine traditional doctrinal research with a socio-legal analysis, as proposed in this thesis. All three works, however, provide a useful starting point for the socio-legal aspects of this research as the systems of measurement they describe can be adapted and applied to this thesis.

In addition to all these secondary works, a wide range of primary literature exists from sources as diverse as the HRC,[38] the UK Parliament,[39] and the Council of Europe.[40] These sources provide data on the ICCPR and ECHR, and on their enforcement in England and Wales.[41] This will usefully inform the socio-legal analysis at the core of this thesis. However, much of the data available needs to be interrogated to produce the more specific data required for this analysis, and so, of themselves, these sources are unable to answer the thesis question.

2.3 Thesis Context

This section is aimed at putting this thesis and its underlying research question (*viz* has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales?) into the context of the existing literature. As indicated above, this research spans a number of areas and within each of these areas there is an existing body of literature upon which this thesis can draw. However, as has also been highlighted, no work currently exists which attempts to provide both doctrinal analysis of the state of human rights protection in England and Wales and socio-legal analysis aimed at providing a quantitative assessment of the courts' ability to protect human rights.

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[38] Particularly helpful are the documents related to the UK's periodic reporting, for example UN Human Rights Committee 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (17 August 2015) UN Doc CCPR/C/GBR/CO/7. Although documents such as this require more detailed examination as they relate to all three jurisdictions within the UK, not solely England and Wales.

[39] For example, Joint Committee on Human Rights, *Enforcing Human Rights, Tenth Report of Session 2017-19* (2017–18, HL 171, HC 669).

[40] Such as the statistical reports on judgments of the ECtHR which are available through the ECHR website.

[41] There are also reports by NGOs which include useful data, such as Donald, Gordon and Leach (n 26). This is particularly helpful as it relates to England and Wales specifically.

The literature which exists, and has been alluded to thus far, provides a valuable starting point for the doctrinal analysis necessary to answer the research question. In particular, it will be necessary to use the existing literature on the ICCPR and ECHR to help to justify the comparison of the two instruments, and to inform analysis of the text and history of both documents. As noted in the previous section, there is a range of books which can provide useful information to bolster this analysis of both texts and to justify their comparison. As was highlighted, however, there is currently very little literature which addresses the two treaties in relation to one another; this thesis aims to provide such a comparison with reference to England and Wales' experience with both treaties. This thesis addresses the gap in literature in a number of ways. First, it uses a new method which combines doctrinal and socio-legal analysis to show not only how the content of the law has changed but also quantitatively analyses the impact of these changes. Second, this thesis addresses a single jurisdiction in detail rather than seeking to examine compliance with international human rights standards more broadly. This means it also addresses the influence of the country's domestic human rights and constitutional law on compliance with these standards. This thesis also studies two treaties specifically, the ECHR and ICCPR, rather than examining a wide range of international human rights instruments. Finally, this thesis examines these changes over a very wide period of time allowing for trends and patterns which would otherwise not be visible to be discerned and analysed.

Whilst a wealth of literature has been published, and continues to be published, in the fields of international human rights law, human rights law in England and Wales, and UK constitutional law, there is little up-to-date literature in relation to incorporation. Indeed, the overwhelming majority of the literature on this topic was written prior to the incorporation of the ECHR by way of the Human Rights Act. This thesis seeks to fill that gap by carrying out research which builds on the data from the 20 years since the Human Rights Act received royal assent in order to demonstrate whether or not incorporation can be linked with better outcomes for the enforcement of individual rights by the courts of England and Wales. It is perhaps, surprising that so little literature examining incorporation of international

human rights law in England and Wales exists. Indeed, given that the Human Rights Act has celebrated over 20 years since receiving royal assent, and given the debate about the future of the Human Rights Act,[42] it is vital that this issue is fully understood so that informed debate can take place.

Although a range of literature on measuring human rights does already exist, little, if any, of this addresses a comparative measure of two instruments in a single country. This thesis aims to fill this gap by developing a new method which will facilitate this kind of quantitative analysis. In this connection, it is hoped that such a measure will not only contribute to the development of new knowledge within the field, but also contribute to the continuing debate on human rights in England and Wales (and the UK more broadly) at present.

This thesis, therefore, provides a new contribution in relation to the understanding of the impact of incorporation on the courts' enforcement of human rights in England and Wales. It goes beyond the current literature to combine doctrinal and socio-legal analysis in order to provide an assessment of how incorporation affects this area of law, providing an analysis of what the law says before assessing how this impacts upon the protection of individual rights. In doing so it not only builds on existing work but also seeks to develop a new method which can be applied in other areas of human rights measurement.

2.4 Conclusion

This chapter has shown that a wealth of literature exists in relation to the doctrinal analysis of many discrete areas of law relevant to this thesis: international human

[42] It has previously been the policy of the Conservative Party to repeal the Human Rights Act: Conservative Party Manifesto 2017. More recently Former Prime Minister Theresa May suggested that the UK should withdraw from the ECHR, rather than simply replace the Human Rights Act: W Worley, 'Theresa May "Will Campaign to Leave the European Convention on Human Rights in 2020 Election"' *Independent* (29 December 2016) <https://www.independent.co.uk/ news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-gen eral-election-brexit-a7499951.html> accessed 18 December 2020. And although this approach seems to have softened, the current policy is unclear and it remains Conservative party policy to 'update the Human Rights Act… to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.' Conservative Party, 'The Conservative and Unionist Party Manifesto 2019' (2019) 48.

rights law generally (and the ECHR and ICCPR specifically), domestic human rights law, constitutional law, and human rights measurement. This chapter has demonstrated that the research undertaken in this thesis will both complement and contribute to the existing research within this field. It will do this by building on the existing doctrinal literature to provide an analysis of the state of human rights law in England and Wales during three periods of time,[43] and will complement this by providing a measurement of human rights enforcement by the courts of England and Wales within these time periods.

This fusion of quantitative human rights measurement with doctrinal analysis allows new knowledge to be developed, and for an assessment of the state of human rights law in England and Wales which would not be possible with doctrinal research alone. As has been shown in this literature review, this kind of research is not currently being undertaken widely, or indeed at all, in relation to England and Wales. The methods to be employed in this thesis are discussed in significantly greater depth in chapter 3. As has been highlighted, it is perhaps surprising that so little literature exists in relation to the measurement of human rights in England and Wales, particularly when it is an area of law which is under significant scrutiny and flux in the present moment, and indeed, has been for quite some time.[44] It is hoped that this contribution to the existing literature can provide a springboard for further research in relation to the measurement of human rights within the UK more broadly, which can be expanded to include other groups of rights, such as those broadly described as economic, social and cultural rights which are currently under greater scrutiny than previously.

[43] Broadly, these time periods are pre-1953, between 1953 and 1998, and post-1998. The justification and rationale for the choice of these time periods is contained within the methodology chapter.

[44] The UK is currently undergoing an increasingly bitter debate on human rights and there remains a great deal which is not well known or understood about the UK's experience with human rights. See, e.g., Jacques Hartmann and Samuel White, 'The Alleged Backlash against Human Rights: Evidence from Denmark and the UK' in Kasey McCall Smith, Andrea Birdsall and Elisenda Casanas Adam (eds), *Human Rights in Times of Transition: Liberal Democracy and Challenges of National Security* (Edward Elgar 2020).

3. Methodology

3.1 Introduction

This thesis aims to answer the research question: Has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales? This core question gives rise to a number of corollary questions. These include:

- How best to demonstrate the differences brought about by incorporation?
- Which instruments should be compared in order to demonstrate this?
- How is the success of human rights enforcement assessed and measured?
- What external factors influence the enforceability of a particular instrument in England and Wales?
- How has England and Wales' regime of human rights protection worked historically, and what effect has incorporation had on this regime?

This chapter explains how the main research question will be answered. First, doctrinal legal research will be used to outline what the law says in relation to the research question. It will show that as a matter of law, the binding nature of international legal agreements should mean that government acts in a manner compliant with their content, regardless of the status of incorporation. The doctrinal analysis will also provide detail on what the law on human rights in England and Wales is, and has been at previous points in the jurisdiction's history. This doctrinal analysis will then be used as the foundation for a socio-legal analysis of how incorporation has affected the use of the ECHR, rather than what the strict legal doctrine says *should* have happened. This socio-legal analysis will also show that, by comparison, the ICCPR has not enjoyed the same acceptance in England and Wales. This comparison acts to support and enhance

the findings in relation to the ECHR by highlighting similarities and differences in their use in the courts of England and Wales.

This chapter first outlines the methods which will be used, and justifies the choices which have been made, discussing their place and purpose before commenting on any drawbacks to particular methods. It will then provide a more detailed description of the manner in which the methods will be used within the thesis itself, examining how each method will be applied, and to what end.

At the outset it is important first to note that the scope of this thesis is necessarily limited, as a consequence of the time available to research this topic. First, in order to ensure the feasibility of the research outlined below, this thesis will examine the judgments of the higher courts (that is, the High Court, the Court of Appeal, the Supreme Court, and its predecessor, the House of Lords) of England and Wales. This allows for a more in-depth analysis of the topic whilst retaining the usefulness of the findings. The majority of the case law in relation to both the ECHR and ICCPR arises from the courts of England and Wales making this the most appropriate choice of the UK's three jurisdictions. Second, in order to ensure that there is a clearly defined and finite body of case law to examine, this thesis assesses the case law prior to a cut-off date of 31 December 2018.[1] Third, this thesis assesses only the textual provisions of the treaties under examination, as incorporation of the treaties does not *ipso facto* mean that the decisions of the relevant interpretive bodies becomes part of domestic law. Rather, the courts will have the power to interpret the Act of Parliament which incorporates a treaty as they would any other such statute.[2] For this reason, this thesis will only examine the jurisprudence of the treaty bodies insofar as they relate to the case law of England and Wales. Thus, this thesis will not systematically address the jurisprudence of the treaty bodies.

[1] This also allows for literature commenting on these cases, as well as court and judgment data, to be published.

[2] It is worth noting, however, that there may be a statutory obligation upon the courts to take into account the jurisprudence of the treaty body. This is the case, for example, with the case law of the of the European Court of Human Rights which the courts must "take into account" when interpreting the ECHR, by virtue of s 2 of the Human Rights Act.

This thesis makes a number of assumptions, *viz* that the ECHR and ICCPR create equally binding human rights obligations on the UK, and, therefore, in England and Wales. It also assumes that a key test of the effectiveness of an international human rights regime is that the courts are able to adjudicate on challenges brought by citizens against the state in relation to human rights, using an international legal standard as a reference point. Importantly, this thesis addresses only civil and political rights and the treaties which pertain to that group of rights. This is to facilitate a comparison between an incorporated human rights treaty and one which is unincorporated. This thesis uses the ECHR as a starting point and thus any other treaty employed must be comparable with the civil and political rights which the ECHR protects.[3]

Equally importantly, there are a number of terms within the research question which require definition. Here, "international human rights instrument" means a treaty which is aimed at the protection of human rights. For the purpose of this thesis the focus is on the civil and political rights protected by the ECHR and ICCPR. As noted above, in reference to this research, "courts" is defined narrowly to mean the higher courts of England and Wales, that is the Supreme Court (and previously the House of Lords), the Court of Appeal and the High Court. In this sense, "incorporation" means the transformation of international law into domestic law by way of a national legislative action, as happened with the ECHR by way of the Human Rights Act.[4] Finally, "better judicial enforcement" means that there is success in the majority of cases where an individual is able to vindicate their rights in the face of violation by the state; this would also correlate with fewer instances of the relevant treaty bodies raising concerns about, or finding violations of, the protection of rights under a treaty. It would also correlate with an increased responsiveness on the part of the courts to arguments on

[3] Although, as acknowledged in chapter 4, the rights protected by the ECHR have expanded to include some rights which are usually classed as economic, social and cultural rights it remains essentially a civil and political rights instrument.

[4] This terminology is discussed in depth in section 5.2.1 of chapter 5. For these purposes, transformation is where "the text of an international treaty is literally 'incorporated' into a statute or another source of domestic law." European Commission for Democracy Through Law, 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' (Study No 690/2012, Council of Europe, 2014) Doc CDL-AD(2014)036 para 23.

human rights grounds. This, in turn, would lead to an increased reference to human rights instruments in court judgments.

3.2 Research Context

As the literature review has demonstrated, the majority of existing academic work in the areas of both constitutional law and human rights law, both domestically and internationally, is historically grounded within the doctrinal method. However, as is outlined below in section 3.3, this approach does not allow the research question underlying this thesis to be answered fully. More recently a broadly socio-legal approach to the analysis of human rights law has emerged, which is aimed at assessing whether international human rights regimes are effective.[5] Such studies (as discussed in the literature review), however, have almost exclusively been based on analysing the effect of an international human rights instrument, or group of such instruments, in a worldwide context. In other words, they have not addressed the application of international human rights instruments, and their effectiveness, within a single, national or sub-national setting.

By contrast with the law, and its historic reliance on the doctrinal method, other areas within the social sciences have applied quantitative analysis to the measurement of human rights more routinely.[6] These methods, referred to broadly as socio-legal, allow for an analysis which would not be possible with "traditional" legal methods, and therefore allow for research to go further than previously possible in analysing not only what the law says but also how the law translates into practice.

In this thesis it is impossible to answer the question fully without the use of socio-legal methods, as the research question goes beyond asking merely what the law says but looks also at how changes in the law affect the operation of human rights. Nowhere is this more the case than in respect of the discussion on the

[5] See, e.g., Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935.
[6] For a recent example, see, e.g., Beth Simmons, *Mobilizing for Human Rights* (Cambridge University Press 2009).

importance of incorporation where there is a great divergence between what international law says is the case and what actually happens.[7] Additionally, in previous analyses, commentators have disagreed on the effectiveness of domestic human rights protections in England and Wales, suggesting that it is difficult to quantify the impact of legal changes on human rights protection.[8] The use of a combination of socio-legal and doctrinal research methods ought to make quantification easier, and the results of this research more reliable

Whilst it is both the doctrinal and socio-legal methods which have been chosen here (both are discussed in more detail below), there is a range of other legal research methods which have not been adopted in this thesis. Empirical research, defined here as "the study of law… using social research methods, such as interviews, observations and questionnaires",[9] has been discounted. This is because, although it provides important qualitative insights into the social aspects of the law's application, it cannot provide a quantitative measure against which to assess the impact of changes of law on the operationalisation of human rights. It therefore cannot answer the research question in full and, whilst it could provide useful insight, there is insufficient time to carry this work out alongside the doctrinal and socio-legal analysis which is required.[10]

Likewise, comparative legal study might have been an appropriate choice here; for example, comparing England and Wales' experience of incorporation with that of another country. Whilst such research would undoubtedly provide valuable insights into human rights protection both in England and Wales and elsewhere, it is not suitable here. This is because no other country within the Council of Europe, the ECHR's treaty body, is easily comparable, given England and Wales'

[7] For discussion of this point see Roger O'Keefe, 'The Doctrine of Incorporation Revisited' (2008) 79 British Yearbook of International Law 7.
[8] For disagreement see, in particular, e.g., Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd edn, Oxford University Press 2009) para 2.40. Citing Murray Hunt, *Using Human Rights in English Courts* (Hart 1997); Francesca Klug, Keir Starmer and Stuart Weir, *The Three Pillars of Liberty* (Routledge 1996); Francesca Klug and Keir Starmer, 'Incorporation Through the Back Door?' [1997] Public Law 223. *Cf* Lord Bingham in *R v Lyons* [2003] 1 AC 976 para 13.
[9] Mandy Burton, 'Doing Empirical Research' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2018) 66.
[10] However, as is noted in the chapter 9, there is scope for this research to add colour to the findings of this thesis.

common law legal system and unique constitutional structure.[11] Those countries which have a similar constitutional set-up, for example, New Zealand, are not parties to the ECHR. The conclusion to this thesis, however, will suggest that there is scope for further work within this field and will further suggest that both empirical and comparative legal research would provide other useful insights which could build on the research undertaken here.

3.3 Methods to be Employed

This thesis will combine a number of research methods to create an overarching method for assessing whether incorporation of international human rights instruments results in significantly better enforcement of individual rights in the courts of England and Wales. In doing so, it seeks to apply the most appropriate method to each area of examination, in order to ensure that the results are not only accurate but also compelling, and that they will contribute new knowledge to the discussion of human rights in England and Wales. The methods which are to be employed in this thesis will now be individually examined.

3.3.1 Doctrinal Method

As an initial point of departure, this thesis will rely on doctrinal research, as doctrinal research is vital in understanding what the law says on a particular issue. In doctrinal research "the essential features of the legislation and case law are examined critically and then all the relevant elements are combined or synthesised to establish an arguably correct and complete statement of the law on the matter in hand."[12] This method is important because it "lies at the basis of the common law and is the core legal research method."[13] Indeed, this method has been so pervasive that "Until relatively recently there has been no necessity

[11] Unique, certainly, in the Council of Europe. Ireland probably has the legal system most readily comparable to that of England and Wales, but Ireland has a different constitutional set-up, with a written constitution (the Bunreacht na hÉireann) and a constitutional court (the Supreme Court). Moreover, the difference in population size would be likely to result in significant analytical complexity when using judgment numbers as a proxy for measuring the effectiveness of treaties.
[12] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 13.
[13] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 85.

to explain or classify it within any broader cross-disciplinary research framework."[14] Despite increasing debate over the place of doctrinal research in the canon of legal research generally, Hutchinson suggests that "it can be argued that the lawyer needs to commence any legal discussion by using this method to critically determine 'what the law is'."[15] It is this investigation of "what the law is" which is central to the use of the doctrinal method in this thesis, as it is this analysis which allows the thesis to show what the law on human rights within the UK was before and after incorporation, as well as prior to the international human rights movement.

Dobinson and Johns aptly describe the doctrinal legal research process as seeking "to collect and then analyse a body of case law, together with any relevant legislation."[16] More importantly for this thesis, "This is often done from a historical perspective and may also include secondary sources such as journal articles or other written commentaries".[17] Particularly, in the context of this thesis, as an extended study of an area of the law over three periods, the inclusion of secondary sources will be vital in fully analysing the state of the law. This description is, however, in danger of being overly simplistic. Indeed, "Doctrinal research is not simply a case of finding the correct legislation and relevant cases and then making a statement of the law which is objectively verifiable."[18] But, it has, as a research method, developed and become "a process of selecting and weighing materials, taking into account hierarchy and authority as well as understanding social context and interpretation."[19]

Purely doctrinal research, however, is not without its flaws. Indeed, one serious weakness of this method is that it looks at the law in a vacuum: "doctrinal researchers do no more than 'work the rules' in isolation".[20] Although, as noted by Dobinson and Johns, social context and interpretation are increasingly used

[14] ibid.
[15] Hutchinson (n 12) 39.
[16] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 21.
[17] ibid.
[18] ibid 24.
[19] ibid.
[20] Hutchinson (n 12) 23.

in the process of doctrinal legal research in order to examine the law as part of the wider societal setting.[21] This general isolation from the wider societal contexts is allied with another limitation of this approach: "The information or data collected is not quantifiable, but rather it is legislation and case law".[22] This means that, whilst the method does allow for a statement of the content of the law in a particular context and at a particular time, it does not easily facilitate a comparison of the law at different times and in different contexts. For this reason, in this thesis, the doctrinal method will be used alongside methods from the sphere of social-legal studies, enabling both a statement of what the law says in specific times and contexts and also an examination of how this has changed. This statement of the law, however, cannot itself answer the research question as it does not allow for a measurement of the enforcement of the rights protected by the ECHR within the courts of England and Wales.

3.3.2 Socio-Legal Research

In addition to the doctrinal research which will be undertaken, this thesis will also employ methods from the field of socio-legal research, in order to build and elaborate on the findings of the doctrinal research. This socio-legal approach allows the law to be placed in context and for measurable, quantitative data to be gathered, analysed and compared in order to assess the impact of incorporation of the ECHR on human rights protection by the courts of England and Wales. This, as noted above, is something which doctrinal analysis cannot do as it examines law within a vacuum.

Cownie and Bradney note that "Socio-legal studies is hard to define because of the diverse range of scholarship carried out under that name".[23] This, in turn, means that "the choice of method and approach is extensive, as is the range of theoretical work upon which the socio-legal researcher can draw."[24] As early as 1983, Harris suggested that socio-legal studies should be interpreted broadly,

[21] Dobinson and Johns (n 16) 24.
[22] Hutchinson (n 12) 18.
[23] Fiona Cownie and Anthony Bradney, 'Socio-Legal Studies' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2018) 42.
[24] ibid 46.

saying “some use the term broadly to cover the study of law in its social context, but I prefer to use it to refer to the study of the law and legal institutions from the perspectives of the social sciences (*viz* all the social sciences – not only sociology).”[25] It is Harris’s broad definition which is adopted here: that is, law in the wider context of the social sciences, rather than simply in the context of sociology. In this case, methods from the sphere of politics and international relations will be adopted.

As this area is so broad, it is necessary to be more specific about the methods to be used in this thesis. Chui notes that the quantitative research method “is used to test or verify the appropriateness of existing theories to explain the behaviour or phenomenon one is interested in”,[26] and identifies three types of quantitative research design: exploratory, descriptive and explanatory.[27] Exploratory research is directed at investigating a specific issue, with the aim of gathering further information on that topic. Descriptive research is focused on providing a description of an issue of interest, and can be used to provide a snapshot of a particular issue. Finally, explanatory research is “designed to explain things and identify how one or more variables are related to one another.”[28] It is the third of these designs which will be employed in this thesis as it will allow for the provision of quantitative data which can be applied in order to provide an answer to the overarching research question. This quantitative data will permit a method of comparative analysis which traditional legal methods cannot do.

This type of quantitative legal research in relation to human rights is discussed in detail by Landman and Carvalho.[29] They describe four types of measures for human rights:

[25] DR Harris, ‘The Development of Socio-Legal Studies in the United Kingdom’ [1983] Legal Studies 315, 315.
[26] Wing Hong Chui, ‘Qualitative Legal Research’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 50.
[27] ibid 52.
[28] ibid.
[29] Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge 2010).

- Events-based measures, which seek to make sense of human rights violations by asking "what happened, when it happened and who was involved";[30]
- Standards-based measures, which "apply an ordinal scale to qualitative information" in order to assess the state of human rights in a particular context;[31]
- Survey-based measures which "collect data on human rights using structured or semi-structured survey instruments applied to a sample of individuals";[32] and
- Socio-economic and administrative statistics which provide "data for the *indirect* measure of human rights, or as indicators for *rights-based approaches* to different sectors".[33]

Of these four, it is the standards-based measures which is closest to what will be adopted here. For this thesis, the data gathered on both the ECHR and ICCPR will be applied to a numerical scale to assess the number of judgments which mention the ICCPR in England and Wales or in which the UK was found to be in violation of the ECHR. This will then be used as a proxy for assessing the effectiveness of England and Wales' legal protection of human rights.

3.4 Application of Methods

Having examined the research methods which will be used in this thesis, this section of the chapter is aimed at providing a methodology for the application of the research methods in order to provide an answer to the research question, *viz* Has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales?

The first substantive chapter of this thesis, chapter 4, examines the ECHR and ICCPR, which have been chosen to form the basis of a comparison at the core

[30] ibid 37.
[31] ibid.
[32] ibid 38.
[33] ibid 39.

of the research question, demonstrating the different in use of the (incorporated) ECHR and (unincorporated) ICCPR. This chapter will examine both instruments from a doctrinal perspective and will substantiate the assertion that the two are comparable for the purposes of helping to answer the thesis question. These two instruments have been selected as it is necessary to examine an incorporated and an unincorporated human rights treaty in the context of England and Wales. As the ECHR is the only such treaty the UK has incorporated, it is necessary to find a second treaty, to which the UK is party, which is appropriate for a meaningful comparison. This comparison aims to show that incorporation has led to greater use of the ECHR but that the ICCPR has not experienced the same increase in use.

This comparison will require analysis of what rights both instruments protect and whether these rights are protected to different extents. Doctrinal analysis will be based on the text of the two documents and will also seek to put each of the instruments into their wider context by examining their backgrounds, adopting a more modern doctrinal approach. As noted above, the analysis will focus on the textual provisions of the treaties and does not set out to address in any detail the jurisprudence of the treaty bodies. As highlighted in the literature review, there is a wide body of work on the histories of these treaties which can also be drawn on to carry out doctrinal research in this area. Once the provisions of the ICCPR and ECHR are reviewed side by side, it will be demonstrated both that the content of the two instruments is sufficiently similar to provide a useful comparison and that there is sufficient difference between the two, in terms of content and extent of rights protected, to make comparison of them purposeful and constructive.

The following chapter, chapter 5, will contain an analysis of the proposition that, as a matter of international law, incorporation should not make a difference to the rights to which those in England and Wales are entitled. This chapter will therefore employ the doctrinal method, demonstrating what the law (in terms of international law, case law and domestic law) says in relation to the UK's treaty obligations under international law. The availability of a range of legal databases, covering case law, statutes, and treaties, will make it possible to access a wide range of primary law in the coverage of this topic. In addition, there exists a wide

range of secondary literature on the subject, facilitating the provision of a clear exposition of what the law says in this area. This chapter is necessary because it is important to understand the interaction between domestic law and international law. This interaction is the reason that incorporation of a treaty in domestic law can lead to a different outcome in the UK, and in this case, in England and Wales.

After these preliminary substantive chapters, chapters 6, 7, and 8, will examine three periods of time. First, the time prior to the UK becoming a party to the ECHR and ICCPR, i.e. prior to 1953;[34] second, the time after the UK became party to the ECHR and ICCPR but before the incorporation of the ECHR, i.e. between 1953 and 1998;[35] and third, the period since the incorporation of the ECHR, i.e. from 1998 to 2018.[36] This will provide an innovative way of comparing first, two international human rights treaties in the context of England and Wales and, second, their use in the courts after incorporation of the ECHR. Importantly, these time periods will allow for trends in the application of these treaties to be detected, analysed and compared.

Chapter 6 will use the doctrinal research method to provide a snapshot of the state of – what we now think of as – human rights in England and Wales prior to the entry into force of the ECHR in 1953. This is vital as it provides a starting point against which to measure the effects of the ECHR on England and Wales' legal system, and to compare these with the ICCPR. Indeed, this doctrinal analysis is what makes the subsequent socio-legal analysis possible as it provides a marker against which to assess the development of human rights in England and Wales. In common with previous chapters, it will use a range of legal databases, covering case law and statutes, to engage in an in-depth examination of this topic. In addition, there is a broad array of secondary literature on the subject, which will

[34] This examines the development and state of the law of England and Wales prior to the entry into force of the ECHR on 3 September 1953. Note that as the UK was party to the ECHR prior to the drafting of the ICCPR this period starts from the time at which the ECHR entered into force.
[35] Between 1953 and the Human Rights Act receiving royal assent in 1998.
[36] That is, 1998 to the cut-off point of this thesis at the end of 2018. The reason 1998 was selected rather than 2 October 2000 (when the Human Rights Act entered into force) is to reflect the fact that certain aspects of the Act, such as s 19 (statements of compatibility for new legislation) were operative from 1998 by virtue of The Human Rights Act (Commencement Order) 1998 SI 1998/2882. Similarly, s 22(4) of the Human Rights Act introduced an element of retrospectivity, allowing certain actions for infringement of the protected rights to be brought against public authorities from 9 November 1998.

support the provision of a clear outline of what the law was at that juncture in the history of England and Wales. In common with chapter 4, which examined the ECHR and ICCPR, this chapter will also aim to place the law in the wider social context.

Chapter 7 will, in a similar way to chapter 6, apply the doctrinal research method to demonstrate the effect of the ECHR on human rights law in England and Wales in the period before the entry into force of the Human Rights Act. It will assess what changes were observable in human rights protection in England and Wales following the UK becoming a party to the ECHR. This will be measured by, *inter alia*, assessing the steps taken by the courts to alter the common law in relation to human rights protection and whether this had an effect on the number of violations found by the ECtHR against the UK.

In common with the foregoing chapters, chapter 7 will make use of case law and statutes, to examine this topic in-depth. In addition, there exists a wide range of secondary literature on the subject, particularly on the debate regarding incorporation, enabling the provision of a statement of what the law was at this point in the history of England and Wales. To supplement the doctrinal analysis, this chapter will also incorporate the socio-legal approach discussed above. In this connection the chapter will analyse the total number of cases brought against the UK before the ECtHR. From these cases there will ensue an analysis of the number of cases in which the UK lost before the ECtHR. This data will be applied to a scale which can be employed to make use of the standards-based measure of human rights as outlined by Landman and Carvalho.[37] This data will be used as a proxy to test the effectiveness of the human rights protections afforded by the ECHR in England and Wales. The data on judgments of the ECtHR is readily available from a number of sources at both the domestic and European level, and this will be used to form the basis of this measuring exercise. This data will be used to compare the situation post-incorporation, which will be examined in chapter 8. This is effective as it allows for a statistical analysis of how the ECtHR has viewed the UK's systems of human rights protection and clearly

[37] Landman and Carvalho (n 29) 64.

demonstrates trends which have occurred in the ECtHR's view of UK compliance with its ECHR obligations. However, the system of enforcement for the ICCPR is different from that of the ECHR, making an identical analysis impossible. For that reason compliance with the ICCPR will be measured in two different ways. First, data will be gathered on the number of references to the ICCPR which appear in the published judgments of the courts of England and Wales.[38] This will be measured in a similar way to ECtHR judgments to illustrate the extent to which the courts of England and Wales made use of the ICCPR and to draw conclusions from this. Again, this data is used as a proxy for assessing the impact of the ICCPR on the law of England and Wales. It is expected that in this period there is little or no mention of the ICCPR within the judgments of those courts. This is, of itself, a significant point which will be explored. In addition to this analysis, the periodic reports of the UK to the HRC, the monitoring body of the ICCPR, will be examined to corroborate the (lack of) use of the ICCPR in England and Wales. This information is readily available from the UN's website, and will allow for a clear picture of the UK's compliance and engagement with the ICCPR to be drawn.

Finally, the analysis in chapter 8 will be carried out in the same way as in chapter 7, examining the UK's record at the ECtHR in the period from 1998 to 2018. This data will be used in the concluding chapter to show that incorporation has led to the UK being found in violation of the ECHR with less frequency.[39] If this assumption is correct, it can be argued that this illustrates that incorporation appears to lead to better outcomes for those seeking to enforce their human rights in the English and Welsh courts, and consequently it has allowed the courts

[38] This will be carried out by way of a search on the British and Irish Legal Information Institute (BAILII) case law database refined to include only judgments of the higher courts of England and Wales which have used the phrase "International Covenant on Civil and Political Rights". This search will be carried out using the "Exact Phrase" search function narrowed down to ensure that only judgments of the High Court, Court of Appeal, Supreme Court, and House of Lords in relation to England and Wales are selected. It is important to note that where a case is appealed and judgments at different levels mention the ICCPR these are counted as separate judgments. For example, judgments in both the Court of Appeal and the Supreme Court in the same case both mentioning the ICCPR would count as two judgments.

[39] The White Paper which led to the introduction of the Human Rights Bill applied similar logic in calling for the change in law; it argued that it was clear that the current law was not adequately protecting rights and that incorporation would lead to better human rights outcomes for those in the UK. See Home Department, *Rights Brought Home: The Human Rights Bill* (White Paper, Cm 3782, 1997), in particular paras 1.14-1.17.

to provide better protection of human rights in England and Wales. In addition to this, an examination of the HRC's reports in respect of the UK and an analysis of the English and Welsh courts' usage of the ICCPR in their judgments will be carried out for this time period. Likewise, this data will be used to show that there has been no significant improvement over time with the protection of those rights which are contained within the ICCPR, even if judicial mention of the ICCPR has become more frequent.

Building on the previous chapters, chapter 9 will draw together the data gathered to illustrate the effect which incorporation has had on the courts pf England and Wales' ability to enforce those human rights protected by the ECHR and compare this with the ICCPR. This data will, for the first time, allow for a comparative, quantitative analysis of the impact of incorporation of international human rights law on the protection of individual rights in courts of England and Wales. This data will be examined in relation to the different periods of time under investigation to highlight trends in the courts' success, or failure, to protect human rights once these rights have been incorporated into domestic law. This chapter will also demonstrate how the findings of this research can be built upon to enhance further the understanding of the effect of incorporation on domestic human rights protection in England and Wales, particularly in relation to economic, social and cultural rights which have, to date, been under protected.

3.5 Conclusion

As outlined in this chapter, this thesis will rely on two main methods in order to address the research question (*viz* has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales?). Starting with the traditional doctrinal method, the thesis will examine the status of the law of human rights at three key stages in the legal history of England and Wales: prior to the ECHR; after the UK became party to these instruments; and, finally, the period since the ECHR was incorporated into domestic law. Once this examination is complete, new methods from socio-legal studies will be adopted to provided quantitative analysis of the use of the ECHR in the courts of England and Wales before and after incorporation, showing the

effect which incorporation has had on the ability of the courts of England and Wales to protect and enforce individual rights. This will then be compared and contrasted with the use of the ICCPR in the same courts during the same three periods, to highlight similarities and differences between the two.

4. International Human Rights Instruments

4.1 Introduction

This chapter will examine the ECHR and ICCPR. It will justify the use of these two instruments for a comparison of their effect in England and Wales. This will form the basis of the examination of the thesis question, *viz* has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales? As a comparison between the ECHR and ICCPR is a central aspect of this thesis, this chapter will highlight that the ECHR and ICCPR protect a similar group of civil and political rights but do not overlap entirely.[1] It will do so by briefly tracing the development of international human rights law, and then by examining these instruments alongside other international human rights instruments to which the UK is party,[2] as well as comparing them with one another. It will be argued that the ICCPR and ECHR are apt for comparison as they contain broadly similar rights. Both also arise directly from the post-World War Two period, when international human rights began to flourish. Crucially, however, the ECHR has been incorporated into domestic law, the ICCPR has not. In some respects the ICCPR arguably provides better protection than the ECHR, for example, in the sphere of fair trial rights, and it is especially here that it will be possible to pinpoint the difference between incorporated and non-incorporated instruments. The chapter will also briefly examine the differences between the enforcement mechanisms for each instrument: ECtHR for the ECHR (which makes judgments),[3] and the HRC for the

[1] Although, as will be shown below, the ECHR does include some rights which fall under the heading of economic, social and cultural rights, such as the right to education in Article 2 of Protocol 1.

[2] "Party" is used in the sense intended by the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331, Article 2(1)(g), meaning "a State which has consented to be bound by the treaty and for which the treaty is in force".
Much of this chapter refers to the UK rather than England and Wales as it is the UK, rather than its constituent nations, which may become a Party to a treaty.

[3] Article 46(1) reads "The High Contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties." But "Judgments of the [ECtHR] are not directly enforceable in a manner similar to that of judgments of domestic courts." William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 860. Schabas goes on to note that "The [ECtHR] has described findings of violation in its judgments as being 'essentially declaratory'", ibid 866. Quoting, *inter alia*, *Verein gegen Tierfabriken Schweiz v Switzerland (No 2)* App no 32772/02, para 61, and *Lyons and Others v United Kingdom* App no 15227/03.

ICCPR (which makes non-judicial decisions). It is the comparison of these instruments which will form the foundation of the assessment of the research question as it will allow this thesis to assess an incorporated and an unincorporated international human rights treaty.

The section on international human rights instruments will outline the development of the international human rights movement, before highlighting that the ECHR and ICCPR are the only two such instruments which justify comparison in this context; this chapter's examination will focus on instruments to which the UK is party. It will provide an overview of the rights protected by both and will demonstrate that the ICCPR, at least on the face of it, offers greater protection of human rights.

The subsequent section, on the ECHR, will outline the history of the ECHR and the UK's relationship with it, initially highlighting the strong links between the ECHR and UDHR and the UK's involvement with the drafting of the ECHR. It will also briefly examine the ECHR's enforcement mechanism: the ECtHR, the Council of Europe and the Committee of Ministers.

Next, this chapter will consider the ICCPR. It will outline the history of the ICCPR and the UK's relationship with it. It will also briefly examine the ICCPR's enforcement mechanism: the HRC. This will all feed into the later discussion and comparison of the ICCPR and ECHR in the subsequent chapters, which will permit a clear answer to be given to the thesis question.

This chapter will not address the issues of sources of international human rights law beyond treaties, as the thesis question relates solely to the issue of incorporation.[4] Thus, human rights arising from customary international law will not be discussed. Moreover, this chapter will not examine in detail issues of international human rights law which do not impact on England and Wales, as the thesis question relates to this jurisdiction alone. Finally, this chapter does not address the issue of rights which are derived from European Union (EU) law: the

[4] Incorporation and the dialogue between UK and international law are discussed in chapter 5.

status of the law of the EU in the UK can be considered a special case and the ongoing negotiations surrounding Brexit at the time of completing this thesis mean that any discussion of issues of EU law will very rapidly be out-of-date. Moreover, those rights which are protected by the EU's Charter of Fundamental Rights are only operative in relation to issues of EU law and do not apply generally.

4.2 International Human Rights Instruments

This section examines the emergence of international human rights instruments. It begins by briefly outlining the development of the international human rights movement before looking at a number of international human rights treaties, focusing on those to which the UK is party. It then examines both the ECHR and the ICCPR, explaining that these two instruments are apt for comparison with one another and justifying the choice of these two instruments as the basis for answering the research question.

4.2.1 The development of the international human rights movement

Before examining any international human rights instruments, it is important to understand the history behind them. The international human rights movement, in its current sense, started with the founding of the United Nations (UN), the charter of which was adopted on 26 June 1945.[5] The UN Charter specifically included "promoting and encouraging respect for human rights and fundamental freedoms" as one of the UN's purposes.[6] Moreover, Articles 55 and 56 of the Charter further underlined this aim, with Article 55 providing that the UN would promote "universal respect for, and observance of, human rights and fundamental freedoms for all without discrimination as to race, sex, language, or religion."[7] Article 56 further requires member states to "take joint and separate action in co-ordination with the [UN]" to achieve the aims set out in Article 55.

[5] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 893 UNTS 119. Hereafter, the UN Charter.
[6] ibid Article 1(3).
[7] ibid Article 55(c).

It can, however, be argued that the movement pre-dates this time.[8] Indeed, the use of the term "human rights" (or rather, the French equivalent "droits de l'homme") dates back to the eighteenth century,[9] and many would suggest that Magna Carta of 1215 is one of the earliest forms of human rights document.[10] However, these documents, and the earlier international agreements, for example those relating to the treatment of civilians and prisoners in times of war, provided rights to limited groups of people, and even then often only in certain circumstances. As late as 1937, Hersch Lauterpacht, who was the editor of Oppenheim's International Law "left intact the book's section entitled 'The Law of Nations and the Rights of Man,' which denied that such rights existed".[11] The first document which would now be considered to be part of the corpus of international human rights law proper is the UDHR. Indeed, "Virtually every state acknowledges an authoritative body of international human rights law that flows from the UDHR."[12]

The UDHR followed on from early attempts to enshrine human rights protections in the Charter of the UN's predecessor, the League of Nations, in 1919. Although this attempt was unsuccessful, endeavours to provide some level of international protection for human rights continued.[13] After the UN was established it asked the Economic and Social Council (ECOSOC) to proceed with drafting a catalogue

[8] Michael Haas, *International Human Rights: A Comprehensive Introduction* (Routledge 2008). Chapter 3 traces the historical basis for human rights back to the Code of Hammurabi in 1780 BC.

[9] For example, in the French Declaration on the Rights of Man of 1789. Thomas Paine was the first to use the term in English. For discussion of Paine's role in the development of the concept of human rights see Robert Lamb, *Thomas Paine and the Idea of Human Rights* (Cambridge University Press 2015).

[10] For example, *Halsbury's Laws* (5th edn, 2014) para 1. This is a viewpoint, however, with which many would also disagree as Magna Carta granted limited rights to an elite group of citizens, and was mostly concerned with restraining the exercise of royal power.

[11] Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 American Journal of International Law 783, 784.

[12] Jack Donnelly, 'International Human Rights: Universal, Relative or Relatively Universal' in Mashood Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 31.

[13] Mashood Baderin and Manisuli Ssenyonjo, 'Development of International Human Rights Law Before and After the UDHR' in Mashood Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 5.

of those human rights which the UN sought to protect through its Charter.[14] ECOSOC created a Commission on Human Rights, chaired by Eleanor Roosevelt, and it was the first task of the Commission to produce a declaration of rights.[15] The history of the drafting is well documented.[16] After the drafting process in the Commission, the declaration was adopted by the General Assembly in 1948.[17] The UDHR is regarded by many as an aspirational document, rather than a legally binding one, but its preamble recognised the need for human rights to be protected as a way of promoting peace.[18] In as much as the Preamble sought human rights protection as a bulwark against "tyranny and oppression",[19] this move towards international respect for human rights is clearly a response to the atrocities of the Second World War, and was aimed at trying to prevent them from occurring again. The UDHR is particularly important as it can be seen as a "framework for subsequent international human rights treaties as well as many regional human rights instruments";[20] particularly, for the purposes of this thesis, both the ICCPR and ECHR are the logical successors of the UDHR.

The development of international human rights significantly gained traction after the adoption of the UDHR. However, it was at a regional level that the next most

[14] Olivier De Schutter, *International Human Rights Law* (2nd edn, Cambridge University Press 2014) 16. The Charter of the UN uses the phrase "Human Rights" in its Preamble and in Articles 1, 13, 55, 62, 68 and 76.
[15] ibid 17.
[16] The process was fraught and saw a range of disagreements between the drafters on many issues, such as the origin of human rights, the ideological divide between the West and East, and whether the instruments should be binding. For a fuller account see, *inter alia*, AW Brian Simpson, *Human Rights and the End of Empire* (Oxford University Press 2001); Baderin and Ssenyonjo (n 13); Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2003); Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 2000).
[17] UNGA Res 217A (10 December 1948) UN Doc A/810.
[18] Simpson (n 16) 11. Although it should be noted that this is not a viewpoint which is universally accepted. Simpson particularly notes that "It imposed no international legal obligations; it established no institutional machinery whatsoever for securing respect for its provisions." However, it can be argued that the importance and the moral and legal weight of the UDHR has increased in the years since it was drafted, as Klug notes although "it is a declaration, not a legally binding treaty… its legal influence around the globe belies that description", indeed "some of the Declaration's articles have been cited so frequently in case law that they are widely considered part of binding, customary international law. More significantly, the UDHR has spawned a range of UN human rights treaties which are legally binding, including the twin UN Covenants on economic, social and cultural rights and civil and political liberties, respectively". Francesca Klug, 'The Universal Declaration of Human Rights at Seventy: Rejuvenate or Retire?' (2019) 90 The Political Quarterly 356, 559.
[19] UDHR (n 17) Preamble.
[20] Baderin and Ssenyonjo (n 13) 8.

significant development took place: the creation of a European agreement on human rights protection, the ECHR. It is perhaps not surprising that it was in Europe, which had witnessed the some of the worst atrocities imaginable during the Second World War, that this took place. As Buergenthal asserts, the Council of Europe, which resulted in the ECHR, had "concluded that UN efforts to produce a treaty transforming the lofty principles proclaimed in the Universal Declaration of Human Rights into a binding international bill of rights would take many years to come to fruition" so they worked to produce their own.[21] Given that it was not until 1966 that the ICCPR was adopted, this appears to have been a prudent decision. Rainey, Wicks and Ovey, however, provide a pair of more compelling reasons for the Council of Europe to begin working on a rights instrument for Europe: first, to avoid repeating the egregious human rights violations of the Second World War, and second, to halt the spread of communism in Europe.[22]

Both the ECHR and ICCPR will be examined in more detail below. The ECHR is not the only regional system for the protection of human rights: in the years since the development of the ECHR the Americas, through the American Convention on Human rights, and Africa, by way of the African Charter on Human and Peoples' Rights, have developed similar systems. These will not be examined further as the UK is not, and could not become, party to either instrument, and therefore the impact of either on judicial decision making in the courts of England and Wales is likely to be negligible. However, the fact of their existence serves to highlight that the international human rights movement has developed outside the UN and European contexts.[23]

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[21] Buergenthal (n 11) 792.

[22] Bernadette Rainey, Elizabeth Wicks and Claire Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 3–4. It is also highlighted that the latter reason explains the constant reference to democratic society throughout the ECHR. Duranti suggests that there were a range of conservative ideas which were secured through the ECHR but concludes that "Conservatives took advantage of the favorable political conditions present in pan-European assemblies to implement a free-market and social Catholic agenda unachievable in national parliaments. Yet, the fact that some employed a human rights vocabulary to which they had been unaccustomed before the Second World War does not mean that their commitment to the individual and collective liberties… was disingenuous. There is little reason to doubt that they sincerely believed that a supranational tribunal was essential to the advancement of human rights and fundamental freedoms in Europe as they understood them." Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2017) 401.

[23] For a more detailed discussion of the development of the regional human rights systems in the Americas and Africa, see Buergenthal (n 11) 794–801.

The table below outlines the range of human rights treaties which have been drafted by the UN. These treaties are used as the basis of the discussion below in relation to the UK as they are considered the "core" UN treaties on human rights.[24]

Treaty	Date Adopted[25]	Entered into Force
International Convention on the Elimination of All Forms of Racial Discrimination	21 December 1965	4 January 1969
International Covenant on Economic, Social and Cultural Rights	16 December 1966	3 January 1976
International Covenant on Civil and Political Rights	16 December 1966	23 March 1976
Convention on the Elimination of All Forms of Discrimination against Women	18 December 1979	17 July 1980
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10 December 1984	26 June 1987
Convention on the Rights of the Child	20 November 1989	2 September 1990
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	18 December 1990	1 July 2003
Convention on the Rights of Persons with Disabilities	13 December 2006	3 May 2008
International Convention for the Protection of All Persons from Enforced Disappearance	20 December 2006	23 December 2010

[24] This is the language used by the UN, e.g., UN Office of the High Commissioner for Human Rights, 'The Core International Human Rights Instruments and their monitoring bodies' <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> accessed 18 December 2020.
[25] ibid.

The breadth of these treaties and their subject matter shows clearly how rapid and expansive the development of international human rights law has been since 1945. Indeed, Buergenthal describes the speed of this growth as "phenomenal".[26]

The UK was a founding member of the UN when it was established in 1945, and the UK is a party to a number of the UN's core human rights treaties. For the purposes of this thesis it is necessary to compare two human rights treaties in the UK context, one incorporated and one unincorporated. The table below outlines the key international human rights treaties to which the UK is party, taking the ECHR and the core UN treaties as the "key" international treaties. As the ECHR is the only incorporated treaty below, it is necessary to find a treaty which is capable of comparison with the ECHR from the list of unincorporated treaties.

Treaties to which UK is Party	UK Ratification	Incorporating Act
International Convention on the Elimination of All Forms of Racial Discrimination	7 March 1969	Not Incorporated
International Covenant on Economic, Social and Cultural Rights	20 May 1976	Not Incorporated
International Covenant on Civil and Political Rights	20 May 1976	Not Incorporated
Convention on the Elimination of all forms of Discrimination Against Women	7 April 1986	Not Incorporated
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	8 December 1988	Not Incorporated
Convention on the Rights of the Child	16 December 1991	Not Incorporated
International Convention on the Rights of Persons with Disabilities	8 June 2009	Not Incorporated
European Convention on Human Rights	8 March 1951	**Human Rights Act 1998**[27]

[26] Buergenthal (n 11) 807.

[27] Although as discussed in chapter 8 the Human Rights Act did not incorporate the ECHR in its entirety, it did incorporate the vast majority of rights contained with the ECHR justiciable in in UK courts, for discussion of this point see, e.g., Dominic McGoldrick, 'The United Kingdom's Human Rights Act 1998 in Theory and Practice' (2001) 50 International & Comparative Law Quarterly 901.

In order to make this a meaningful comparison it will be necessary to compare the ECHR with a broadly similar treaty. A number of the treaties to which the UK is party but which have not been incorporated are highly specialised, for example the International Convention on the Rights of Persons with Disabilities. Of the treaties to which the UK is party the two most wide-ranging are the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[28] However, for the purposes of comparison, the rights contained in the ICCPR align far more closely with those in the ECHR than those contained within the ICESCR do. Next, this chapter assesses the comparison between the ECHR and ICCPR; it shows that the two overlap but are dissimilar enough to make comparison purposeful.

4.2.2 The ECHR and ICCPR

The ECHR and the ICCPR, although broadly similar, do not overlap entirely, as the table below illustrates.[29]

ICCPR		ECHR[30]	
Article	**Protection**	**Article**	**Protection**
1	Right to Self Determination		
6	Right to Life	**2**	Right to Life
7	Prohibition of Torture, Inhuman or Degrading Treatment	**3**	Prohibition of Torture, Inhuman or Degrading Treatment
8	Protection from Slavery, Forced or Compulsory Labour	**4**	Protection from Slavery, Servitude or Forced Labour

[28] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[29] This analysis is based on the text of the treaties and thus does not address the way, for example, that the ECtHR has developed the scope of some rights beyond the text of the treaty. As noted in the methodology (chapter 3) this is because incorporation of a treaty does not in all cases bring with it the developments of the text and it is possible for a treaty body to roll back an expanded interpretation. See also the discussion of the operation of the Human Rights Act in chapter 8 for further detail on the way in which the UK courts are required to treat judgments of the ECtHR.

[30] This includes only the rights contained in the main body of the ECHR and those protocols to which the UK is party as the scope of this thesis only covers the UK. The UK has signed, but not ratified, Protocol 4; neither signed nor ratified Protocol 7; and neither signed nor ratified Protocol 12.

9	Right to Liberty and Security of the Person	**5**	Right to Liberty and Security of the Person
10	Right to be Treated with Humanity and Respect where Deprived of Liberty		
11	Prohibition of Imprisonment for Breach of Contract		
12	Right to Freedom of Movement		
13	Protection Against Arbitrary Expulsion of Aliens from a State [31]		
14	Right to Justice, Equality before the Law, and Fair Trial	**6**	Right to a Fair Trial
15	Prohibition of Retroactive Criminal Punishment	**7**	Prohibition of Retroactive Criminal Punishment
16	Right to Recognition as a Person Before the Law		
17	Right to Privacy	**8**	Right to respect for Privacy (including family life)
18	Right to Freedom of Thought, Conscience, and Religion	**9**	Right to Freedom of Thought, Conscience, and Religion
19	Right to Freedom of Expression	**10**	Right to Freedom of Expression
20	Prohibition of Propaganda for War		
21	Right to Peaceful Assembly	**11**	Right to Freedom of Assembly and Association
22	Right to Freedom of Association		
23	Right to Marriage	**12**	Right to Marriage
24	Right of Children to Protection, Name, and Nationality		
25	Right to Participate in Public Life and Society	**Prtcl 1 – Art 3**	Right to Participate in Elections
26	Right to Freedom from Discrimination	**14**	Right to Freedom from Discrimination

[31] There are protections in relation to collective expulsion in ECHR Protocol 4, Article 4, however, the UK has signed but not ratified this protocol.

27	Protection of Minorities' Rights		
		13	Right to an Effective Remedy
		Prtcl 1 – Art 1	Right to Property
		Prtcl 1 – Art 2	Right to Education
Prtcl 2	Abolition of the Death Penalty	**Prtcl 6 & 13**	Abolition of the Death Penalty

As this table makes clear, the rights contained in the ICCPR and ECHR show a significant degree of overlap, however, the rights protections afforded by the ICCPR arguably extend further than their ECHR counterparts. That the two instruments diverge is also the view of the ICCPR's treaty body, the HRC. The HRC said in a response to the UK's seventh period report that it noted "that the Covenant is not directly applicable in the State party and… *recalls that several Covenant rights are not covered by the Human Rights Act 1998*".[32] Similarly, Schmidt notes that "While the scope and coverage of the two instruments is comparable, there are, nonetheless some noteworthy differences."[33] He goes on to highlight a number of these, making clear that his list is non-exhaustive.[34] One such example is found in the protections of fair trial procedures, which Schmidt notes "are spelled out in more detail in Article 14 of the [ICCPR], compared with Article 6 of the ECHR."[35] He also highlights that, *inter alia*, the ICCPR's protections of political rights,[36] of the rights of detainees to humane treatment,[37] and of minority rights[38] exceed those of the ECHR.

[32] UN Human Rights Committee 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (17 August 2015) UN Doc CCPR/C/GBR/CO/7, para 5. Emphasis added. Although it refers to the Human Rights Act, as chapter 8 outlines, the rights contained in the ECHR are almost entirely protected by the Act.
[33] Markus Schmidt, 'The Complementarity of the Covenant and the European Convention on Human Rights – Recent Developments' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon 1995) 629.
[34] ibid. Some of his examples are less relevant now than they were in 1995 as the ECHR has been updated by way of additional protocols. Thus, for example, his comments about the divergence on the right to property are now largely addressed by ECHR Protocol 1.
[35] ibid 632.
[36] ibid 639.
[37] ibid 640.
[38] ibid 641.

The drafting histories of the ICCPR and ECHR were fraught with difficulty. These histories are examined in sections 4.3 and 4.4, below. It is worth noting, however, that neither treaty contains extensive economic and social rights.[39] In the ICCPR's case this was as a result of divergent opinion on whether both sets of rights should be protected in a similar way,[40] and of the ECHR, David Maxwell-Fyfe, one of the drafters said:

> Our list, it is true, contains none of the so-called economic or social rights which appear in the [UDHR]. Such rights would, in my view, be too controversial and difficult of enforcement even in the changing state of the social and international development in Europe, and their inclusion would jeopardise the acceptance of the [ECHR].[41]

In addition to the differences in the rights protected by both instruments, the enforcement mechanisms are significantly different. The ECHR has a tri-partite enforcement mechanism, made up of the Council of Europe's Parliamentary Assembly and Committee of Ministers, as well as the ECtHR. The ECtHR is empowered to make legally binding judgments against member states[42] and the Committee of Ministers oversees member states' compliance with these judgments.[43] The Committee of Ministers' work is informed by the Parliamentary Assembly, a deliberative body which makes recommendations to the Committee.[44] By comparison, compliance with the ICCPR is supported by the HRC which is not empowered to make binding decisions.[45]

The ECHR is also an apt example for comparison with other human rights regimes as "it has long been argued that the [ECHR] remains by far the most

[39] However, the ECHR has developed, by way of its additional Protocols, to include rights which would usually be considered as being part of the category of economic, social and cultural rights, for example the right to property in Article 1 of Protocol 1.
[40] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights* (2nd edn, Oxford University Press 2005) para 1.11.
[41] Council of Europe (ed), *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights* (Martinus Nijhoff 1975) 116.
[42] ECHR Article 46(1). Discussed below.
[43] ECHR Article 46(2).
[44] Rainey, Wicks and Ovey (n 22) 5.
[45] Gerald L Neuman, 'Giving Meaning and Effect to Human Rights' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present and Future* (Oxford University Press 2018) 33.

successful manifestation of the aspiration of the UDHR and it has created the most effective system of international protection of human rights in existence."[46]

This section has demonstrated that the growth of international human rights law since the Second World War has been rapid. The UN Charter itself contained references to the promotion of human rights, and it has been the UN which has arguably been the main driver in the development of international human rights law. However, for the purposes of this thesis it is necessary to look at international human rights law from the standpoint of the UK and, more specifically, England and Wales. The UK has, to date, become party to almost all of the UN's core human rights treaties,[47] but has not incorporated any of these treaties into domestic law. By contrast, in 1998 the Human Rights Act incorporated the ECHR into domestic law, following a lengthy debate of the merits of this course of action.[48]

In order to assess the impact which incorporation has had on the enforcement of international human rights law in the UK it is necessary to compare an incorporated with an unincorporated instrument. It has been shown that the ECHR and ICCPR are comparable for the purposes of answering this question. This chapter will now examine both instruments individually, assessing their backgrounds, the rights they contain and their respective enforcement methods. This exercise will further underline their suitability for detailed comparison with a view to answering the thesis question.

4.3 The European Convention on Human Rights

Discussing the ECHR in 1995 the former Vice-President of the European Commission of Human Rights said that it could be viewed as "one of the great

[46] Ed Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press 2010) 2.
[47] The UK is not party to either the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families or the International Convention for the Protection of All Persons from Enforced Disappearance.
[48] Incorporation will be addressed in chapter 5.

revolutions of international law."[49] This section aims to provide a general outline of the ECHR. It will provide a brief background to the ECHR itself, and a discussion of the UK's involvement with the creation of the ECHR. It then examines the enforcement mechanisms which pertain to the ECHR.

4.3.1 Background to the ECHR

The ECHR is rightly viewed as a by-product of the horrors of the Second World War. As Bates notes, "the end of World War Two and the creation of the United Nations, marks the birth of international human rights law in modern times."[50] There is a link between the UDHR and the ECHR, indeed, the Preamble to the ECHR directly addresses the UDHR and notes the common aims between the two. However, "the first proposals for the ECHR had been made a good six months before the completion of the UDHR".[51]

The ECHR was never intended to be a mere facsimile of the rights contained within the UDHR. The rights contained in the latter include both civil and political rights and economic and social rights. However, as has already been shown, the ECHR did not include all of the "economic or social rights which appear in the [UDHR]" given that that group of rights was thought to "be too controversial and difficult of enforcement even in the changing state of the social and international development in Europe", and were likely to present significant difficulties in respect of agreeing the final text of the ECHR.[52] The Preamble to the ECHR makes clear that it was intended to be the beginning of a process, noting that it was intended "to take the first steps for the collective enforcement of certain of the rights stated in the [UDHR]".

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[49] Jochen Frowein, 'Implementation of the Reform of the European Convention on Human Rights Control Machinery', *8th International Colloquy on the European Convention on Human Rights* (Council of Europe 1996) 175. The Commission on Human Rights is discussed below in section 4.3.2 of this chapter.
[50] Bates (n 46) 33.
[51] ibid 40.
[52] Council of Europe (n 41) 116. Although since drafting the scope of the ECHR has expanded by way of various additional protocols, such as the rights to property and education in Optional Protocol 1.

Initially, at least, the ECHR was not only designed to be a way of promoting human rights, but also as a way of preventing "the rise of another Hitler" and preventing Europe "being overrun by communists".[53] But more than this, it was argued that the ECHR was aimed at bringing Europe together, to "demonstrate clearly the common desire of the Member States to build a European Union in accordance with the principles of natural law… and of democracy".[54] This also explains Maxwell-Fyfe's concern about anything which might jeopardise the acceptance of the ECHR.

The UK played a significant, if slightly ambiguous, role in the drafting of the ECHR.[55] The UK's early participation extends beyond simple involvement in the drafting of the ECHR itself: the UK was the first country to deposit an instrument of ratification, in 1951.[56] Although Bates notes that "There is good reason to suggest that the British decision to sign and subsequently ratify the Convention was chiefly due to political, 'face-saving' considerations."[57] Similarly, although heavily involved in the drafting of the ECHR it was a difficult negotiating partner. Marston notes that "notwithstanding the [Prime Minister] Attlee administration's willingness to subscribe to statements of human rights and even to take the lead in their formulation, it set its face against their implementation by a system of individual petition and a court of compulsory jurisdiction."[58] He locates the reason for this in the political situation at the time, particularly the fears "that individual petition might be used as a weapon of political agitation in the cold war and that it might subvert the respect of dependent peoples for the established imperial authorities."[59]

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[53] Bates (n 46) 44. It is therefore no surprise that the initial drafters of the ECHR and members of the Council of Europe were western European States; the Council of Europe expanded after the break-up of the USSR. Information on the member states is available from the Council of Europe, here: <https://www.coe.int/en/web/about-us/our-member-states> accessed 18 December 2020.
[54] Council of Europe (n 41) 216.
[55] For an in-depth discussion of the political role the UK had in the development of the ECHR see Geoffrey Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950' (1993) 42 International & Comparative Law Quarterly 796.
[56] 'Convention for the Protection of Human Rights and Fundamental Freedoms' (*UN Treaties Collection*) available at: <https://treaties.un.org/pages/showDetails.aspx?objid=080000028014a40b> accessed 18 December 2020.
[57] Bates (n 46) 98.
[58] Marston (n 55) 825.
[59] ibid.

Interestingly, in a survey of the UK's involvement in the drafting of the ECHR Wicks notes that "It seems to have been assumed that the United Kingdom, as a democracy, would have nothing to be concerned about."[60] Indeed, the UK appears to have viewed the ECHR as a test of civilisation, which could be used as "a 'basic test of membership' for the democratic club of European States."[61] However, the idea that European, democratic nations would be able to create and then largely ignore the ECHR and the ECtHR was refuted when the countries such as the UK "began being held to be in violation of the Convention rights."[62]

It is clear, then, that the ECHR was about more than human rights, and preventing the wrongs of the past: it was also aimed at gathering together Europe's advanced, democratic countries to help to secure the West's future in the face of the escalating conflict with the East.[63] It is also clear that the rights contained in the ECHR are significantly different from those contained in the UDHR, although there is a strong overlap and the ECHR is a clear development of the thinking behind the UDHR. This overlap, and the background to the ECHR will be re-examined briefly in the conclusion to this chapter by comparison with the ICCPR.

4.3.2 The ECHR's Enforcement Mechanism

The enforcement mechanism for the ECHR is of paramount significance to this thesis for a number of reasons: first, it was one of the earliest examples of an enforcement structure being created to ensure that human rights were safeguarded, and second, because the binding nature of the ECHR's enforcement mechanism sets it apart from that of the ICCPR. Whilst it is true to say that the ECHR is *one* of the earliest examples of rights being protected in a binding treaty, it is not correct to say that it was the first. Whilst "In 1939 there were, at an international level, no universal or even regional arrangements for the

[60] Elizabeth Wicks, 'The United Kingdom Government's Perceptions of the European Convention on Human Rights at the Time of Entry' [2000] Public Law 438, 441. It is important to note that this assumption was by no means unique to the UK either.
[61] Bates (n 46) 5.
[62] Wicks (n 60) 454. The UK's track record before the ECtHR is addressed in chapters 7 and 8.
[63] The founding members of the Council of Europe was a largely homogenous group of democratic nations who believed they had much to lose if communism spread further West. The founding members were Belgium, Denmark, France, Ireland, Italy, Luxemburg, The Netherlands, Norway, Sweden and the UK.

general protection of individuals against ill treatment by their own governments",[64] there had been a number of movements which might be seen as precursors to such an arrangement. Simpson suggests that the Treaty of Paris of 1856[65] "embodied, for the very first time, the notion of a *collective* international guarantee of rights."[66] The treaty was designed to protect the Principalities of Wallachia and Moldavia in the aftermath of the Crimean War, providing for the two principalities to be protected by Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey.[67] Article XXII, however, specified that "No exclusive protection shall be exercised over [the Principalities] by any of the Guaranteeing Powers. There shall be no separate right of interference in their internal affairs." Simpson asserts that "This was a fatal flaw, and the guarantee was ineffective."[68] The treaty provided for rights, *inter alia*, to equality before the law, individual liberty, and the abolition of class based privileges; such rights, however, favoured the Christian majority, "Non-Christians… who formed the minority, did not fare so well."[69] But, for the majority "These were the most elaborate protective provisions yet to be found in any treaty", indeed, "they went beyond mere minority protection, providing, for the first time, a general scheme of internationally protected civil and political rights."[70] Despite this early example of the beginnings of the international human rights movement, however, the ECHR remains "one of the major developments in European legal history".[71]

The ECHR's system of protection has developed over time. The ECHR originally provided for a two-part enforcement mechanism:[72] the European Commission of Human Rights (the Commission) and the ECtHR. The Commission was empowered to receive any complaint from states[73] or from persons, groups of

[64] Simpson (n 16) 90.
[65] (adopted 30 March 1856) 114 CTS 409.
[66] Simpson (n 16) 115–116. Emphasis in original.
[67] Article XX.
[68] Simpson (n 16) 116.
[69] ibid.
[70] ibid. For greater discussion of the developments which led to this point, see chapter 3 'The International Protection of Individual Rights before 1939' in ibid 91–156.
[71] Michael O'Boyle, 'On Reforming the Operation of the European Court of Human Rights' [2008] European Human Rights Law Review 1, 1.
[72] ECHR former Article 19.
[73] ECHR former Article 24.

persons, or non-governmental organisations[74] where the complainant alleged a breach of their rights under the ECHR. It is worth noting, however, that the latter right of individual petition was optional.[75] The process under former Article 25 was that the Commission would consider an application and make a decision on whether or not the admissibility requirements had been met. If it was decided that the application met the admissibility requirements it would be investigated. If the application did not meet the requirements the matter would not be taken any further. The investigation of an admissible application would result in a report which would clarify whether the Commission believed there to be an ECHR violation. This report was made available to the Committee of Ministers,[76] which would work to reach a friendly solution to the complaint. If no friendly settlement could be reached[77] at this stage in the process the final decision would be taken by either the Committee of Ministers or the ECtHR;[78] in common with the recognition of individual petition, the member states had to accept voluntarily the jurisdiction of the ECtHR.[79] Rainey, Wicks and Ovey note that the issue with the political organ of the Council of Europe making decisions on ECHR violations was a "compromise to ensure that all applications resulted in a final determination", and that a practice developed whereby the Committee of Ministers would simply endorse the Commission's report.[80]

This complex early system of enforcement was, at least in part, a result of the difficulties in securing agreement for the establishment of the ECtHR. For example, voices within the UK had been opposed to the creation of the ECtHR,[81] indeed, the UK believed that the "machinery set up for enforcing the [ECHR]

[74] ECHR former Article 25.
[75] The UK, for example, did not allow for individual petition until 1966, almost 15 years it had ratified the ECHR. See Bates (n 46) 551 for a survey of when member states accepted the right of individual petition.
[76] The Council of Europe's political organ. It is made up of one representative from the government of each member state, usually the Minister for Foreign Affairs (Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS 1, Article 14).
[77] It was anticipated that such a settlement should be reached "on the basis of respect for human rights", according to ECHR former Article 28.
[78] Rainey, Wicks and Ovey (n 22) 9.
[79] For a detail on the acceptance of the ECtHR jurisdiction under ECHR former Article 46 see again Bates (n 46) 521. It is interesting to note that Rainey, Wicks and Ovey assert that there was a "clear expectation" that the member states would recognise the competence of the ECtHR anyway, Rainey, Wicks and Ovey (n 22) 9.
[80] Rainey, Wicks and Ovey (n 22) 9.
[81] Simpson (n 16) 655–656.

should not be purely judicial but should be able and competent to give due weight to political as well as legal considerations."[82] The UK's proposals for a political enforcement mechanism for the ECHR, rather than a judicial one, were supported by both The Netherlands and Norway;[83] indeed, "Only a minority of States had been in favour of a Court" at one of the high-level preparatory meetings for the ECHR.[84] However, as time went on this system was overhauled, and the original process was replaced by Protocol 11 which replaced this dual approach to decision-making with a permanent ECtHR, with the new system taking effect on 1 November 1998. The ECtHR still retained a duty to seek a friendly resolution to applications,[85] and it could adjudicate on claims made in respect of states[86] as well as individual petitions.[87] Under the new process the admissibility decisions were made by a three judge committee which assessed whether the ECHR's admissibility criteria had been met.[88] The three judges were required to be unanimous in order to declare an application inadmissible.[89] Admissible cases were then referred to a seven judge Chamber of the ECtHR, which also had the power to make an admissibility decision where the three judge panel was not unanimous. Where a case was particularly important a Grand Chamber of 17 judges could hear the case. The final judgment of the ECtHR is binding on the member states who are party to the case.[90] It is the role of the Committee of Ministers to supervise the execution of ECtHR's judgments.[91]

The process has since been reformed again, by Protocol 14, which reflected the "spectacular increase of the applications filed every year."[92] Bates summarises the outcome of Protocol 14 as being "to maximise economy of procedure at Strasbourg by devolving admissibility, merits, and just satisfaction to smaller and

[82] UK Foreign Office minute, written after a meeting of senior officials, quoted in ibid 701.
[83] ibid 702.
[84] Bates (n 46) 124.
[85] Former Article 38(1)(b).
[86] Article 33.
[87] Article 34, again, this covers persons, groups of persons, and non-governmental organisations.
[88] The criteria are laid down in former Articles 27 and 28.
[89] Former Article 28.
[90] Article 46(1).
[91] Article 46(2).
[92] 'Protocol 14 – The reform of the European Court of Human Rights' (Council of Europe, 15 May 2010) <https://rm.coe.int/168071f2f4> accessed 18 December 2020.

smaller units within the Court."[93] Protocol 14 made three main changes to the process established under Protocol 11: a "reinforcement of the Court's filtering capacity to deal with clearly inadmissible applications", "a new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage" and "measures for dealing more efficiently with repetitive cases".[94] Under the current process single judges sitting alone are empowered to make decisions regarding admissibility,[95] streamlining the process significantly. If no friendly settlement is reached,[96] and the case has not been declared inadmissible, a judgment on the merits of the case can be made by committee of three judges or a chamber of seven judges.[97] Judgments of the court do not provide detail on the action which member states must take to address the violations where these are found: such action is at the discretion of the member state itself. Where a case is "exceptional" a reference may be made to the Grand Chamber of 17 judges for judgment.[98] Any judgment of the Grand Chamber is final, whilst other judgments become final where the parties indicate that they do not wish to refer the judgment to the Grand Chamber, where three months has elapsed since the judgment, or where the Grand Chamber rejects such a request to refer the judgment.[99] As noted above, the decision of the ECtHR is binding on member states. Article 46 of the ECHR, as amended by Protocol 14, charges the Committee of Ministers with overseeing the enforcement of the ECtHR's judgments. Under Protocol 14, the Committee of Ministers may now ask the ECtHR to clarify a judgment or may refer a member state to the ECtHR for non-compliance.[100]

In addition to the Committee of Ministers and the ECtHR, the Parliamentary Assembly of the Council of Europe also plays a part in the mechanism of enforcement. The Parliamentary Assembly is a deliberative body, and its recommendations, resolutions and opinions inform the work of Committee of

[93] Bates (n 46) 500.
[94] ibid.
[95] Article 27.
[96] Under Article 39 the ECtHR must "at any stage of the proceedings" place itself "at the disposal of the parties with a view to securing a friendly settlement".
[97] Article 27(2). In addition, Article 55 permits the ECtHR to create its own rules and procedures.
[98] Article 43.
[99] Article 44.
[100] Article 46(4).

Ministers.[101] The legal and political aspects of the ECHR's enforcement mechanism have arguably helped make a success of the system, although the long-running debate on prisoner voting in the UK has shown that the system does not always result in rapid compliance with the judgments of the ECtHR.[102]

As has been shown, the ECHR was one of the first examples of international human rights law being used to create an enforceable, basic standard of human rights at a supra-national level, and, in that aim, it has been highly successful. The ECHR itself is a clear inheritor of the same post-World War Two movement which resulted in the UDHR, but it went one step further by creating an enforcement mechanism which could work to ensure that these rights were more than aspirational. Admittedly, the content of the ECHR is on one level the result of some degree of compromise. As Maxwell-Fyfe noted, in order to be successful, the ECHR had to be acceptable to all of the Council of Europe's member states, as anything too controversial would have had the potential to derail the project.[103] The ECHR has, however, succeeded, and it is a measure of that success that the enforcement mechanism has had to be changed to adapt to the sheer volume of those seeking to ensure that their human rights are protected. Indeed, Fenwick calls the ECHR "astoundingly successful" and notes that "the enormous and continuing increase in the number of petitions" indicates that its true potential is only now being understood.[104]

In the context of this thesis the ECHR is also important. The UK has been involved with the ECHR since its inception, and in 1998 it incorporated the ECHR into domestic law. By comparison, the ICCPR, which shares the ECHR's background, does not enjoy a similar level of acceptance in UK law. The ECHR is not only an ideal instrument to compare with the ICCPR. It is also, as has been demonstrated, the only international human rights instrument which the UK has

[101] Rainey, Wicks and Ovey (n 22) 5.
[102] The most recent judgment of the ECtHR, finding that there had been a violation of Hirst's right to vote was *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41. However, the situation was not addressed until 2017 when the right to vote was extended to prisoners on released on termporary licence (see David Lidington 'Oral statement to Parliament: Secretary of State's oral statement on sentencing' (UK Government, 2 November 2017) <https://www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-sentencing> accessed 18 December 2020).
[103] Bates (n 46) 44.
[104] Helen Fenwick, *Fenwick on Civil Liberties and Human Rights* (5th edn, Routledge 2017) 101.

chosen to incorporate. A final analysis of the two instruments in relation to one another will take place in the conclusion to this chapter.

4.4 The International Covenant on Civil and Political Rights

The ICCPR has been referred to as "probably the most important human rights treaty in the world" as it enjoys universal coverage, encompasses a broad range of rights, and applies to all types of persons.[105] This section examines the development of the ICCPR. In particular it highlights why there was such a significant gap between the initial idea for a worldwide bill of rights and the delivery of both the ICCPR and ICESCR. It will also assess the enforcement mechanism which is attached to the ICCPR. Both the survey of the ICCPR's history and the examination of its enforcement mechanism will feed into a justification of the comparison of the ICCPR and ECHR in the conclusion of this chapter.

It is necessary in outlining the background of the ICCPR also to refer to the process which led to the ICESCR. Initially it had been intended that there would be a single treaty which protected both the civil and political and the economic and social rights contained in the UDHR.[106] Indeed, the approach of the UN was always that both civil and political rights, and economic, social and cultural rights are "interdependent and indivisible", however during the early stages of drafting it was clear that there was a divergence of opinion on these rights between states.[107] The Western governments were of the (ultimately prevailing) view that the two sets of rights fundamentally differed from one another and therefore should be separated, whilst the Eastern states took the view that to divide the groups of rights might suggest a hierarchy between the two.[108] These fears may have been well founded as it is certainly the case that "the ICCPR is the stronger of the two [treaties]."[109] As will be made clear, the drafting of the ICCPR was long

[105] Joseph, Schultz and Castan (n 40) para 1.01.
[106] Sarah Joseph, 'Civil and Political Rights' in Mashood Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 91.
[107] Joseph, Schultz and Castan (n 40) para 1.11.
[108] ibid.
[109] ibid.

and difficult. The debate which led to the separation of these rights into two treaties is simply one aspect of this protracted process.

4.4.1 The History of the ICCPR

Like the ECHR, the history of the ICCPR is bound up in the aftermath of the Second World War. It stems from the UDHR, but in order "To afford effective protection against tyranny and oppression, it was essential to translate the text of the [UDHR] into binding treaty law, backed up by international supervision and enforcement."[110] This translation from the UDHR to binding treaty was, however, far from easy. Indeed, "tensions between West and East had already overshadowed the drafting process of the UDHR" and this tension again came to the fore in the drafting of the ICCPR and ICESCR.[111] But the difficulties were not simply confined to division on an East-West axis; other factors also came into play. One such example is the decolonisation movement, which led to the rapid expansion of UN membership from 58 to 122 between 1948 and 1966, and saw new groups of countries with similar aims emerge at the UN, and vote together.[112]

Beyond the political realities, however, the biggest issue for those engaged in drafting the binding human rights treaties was that it needed "States to submit to international supervision their relationship with their own citizens, something which has been traditionally regarded as an absolute prerogative of national sovereignty."[113] Thus, any agreement on legally binding international rights treaties would precipitate significant change as it would fundamentally alter the relationship between UN member states and their citizens. Not only this, the post-

[110] Maya Hertig Randall, 'The History of the Covenants' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present and Future* (Oxford University Press 2018) 26.
[111] ibid 10.
[112] This is the period between the adoption of the UDHR and the adoption of the ICCPR, this information is available at UN, 'Growth in United Nations Membership, 1945-Present' <www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> accessed 18 December 2020. It is to be noted that authors, such as Simpson, caution against seeing the movement for decolonisation as a human rights movement: Simpson (n 16) 300.
[113] Speech by John Humphrey (1 January 1952) UN Archives/Geneva, SOA 317/4/01 (C), quoted in Paul Gordon Lauren, *The Evolution of International Human Rights Law: Visions Seen* (3rd edn, University of Pennsylvania Press 2011) 232.

war powers were aware that their record in relation to human rights was not without criticism: “the Soviets had domestic terror and the Gulag; England and France had colonies; and the United States had racism.”[114]

These concerns led to behaviour motivated by self-interest and designed to slow down the process of negotiations. Indeed, in 1951 the UK decided that the “prudent course might be to prolong the international discussions, to raise legal and practical difficulties, and to delay the conclusion of the Covenant as long as possible.”[115] So prolonged were the discussions for both the ICCPR and ICESCR that, in 1965, the International Convention on the Elimination of All Forms of Racial Discrimination[116] became the first UN human rights treaty to be adopted following on from the UDHR.

Further complicating matters, it was not simply between obvious parties that dissent arose during the drafting process. There was also clear “disagreement among allies.”[117] The United States opposed the UK’s preference for “precise drafting and detailed and specific limitations.”[118] Conversely, the UK officials believed that the United States “wanted a text which committed nobody to anything”[119] and which was “sufficiently meaningless for Congress to ratify”.[120] Clearly, then, the process was not an easy one, and this perhaps best explains the significant gap between the start of the drafting process and the final adoption of the ICCPR in 1966. Negotiations led, however, to a number of deft compromises. For example, in order to respect national sovereignty, particularly in traditions like the UK where Parliament is sovereign, the ICCPR requires that states “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”;[121] this clearly places the onus on

[114] Wiktor Osiatynski, ‘On the Universality of the Universal Declaration of Human Rights’ in Andras Sajó (ed), *Human Rights with Modesty: The Problem with Universalism* (Springer 2004) 36. Quoted in Hertig Randall (n 110) 12.
[115] UK Foreign Secretary, Herbert Morrison, quoted in Simpson (n 16) 815.
[116] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.
[117] Hertig Randall (n 110) 13.
[118] Simpson (n 16) 518.
[119] ibid 467.
[120] JP Duffy, quoted in ibid 521.
[121] Article 2(3)(a).

individual states to ensure that the rights contained within the ICCPR are given sufficient protection.

For all these difficulties, the result of the tense and prolonged discussions was the adoption of both the ICCPR and the ICESCR in 1966, a development which ideologically followed on from that of the UDHR. It had been the view when the UDHR was adopted that it was simply "a step forward in the great evolutionary process",[122] and the adoption of these two treaties was the next step in that process.

4.4.2 The ICCPR's Enforcement Mechanism

As is clear, the ICCPR's drafting process had been prolonged and difficult, but it was the discussion regarding the enforcement mechanism which was "the most difficult and controversial aspect" of all.[123] An early draft of the ICCPR "envisioned a quasi-judicial Human Rights Committee quite different in its powers and functions from that which actually came into existence."[124]

Compliance with the ICCPR is supervised by the HRC,[125] which was established under the ICCPR itself.[126] It is made up of eighteen individuals (usually "law professors, diplomats with legal qualifications, national court judges, etc")[127] who serve in personal capacities.[128] Indeed, as Harris notes, "It is of vital importance that they are independent members who do not represent their national states or

[122] Verbatim Record of the General Assembly proceedings, GAOR 3rd Session (10 December 1948) UN Doc A/PV.183, 934.
[123] The Polish delegate, quoted in Philip Alston, 'The Committee on Economic, Social and Cultural Rights' in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford University Press 1992) 476.
[124] Torkel Opsahl, 'The Human Rights Committee' in Philip Alston (ed), *The United Nations and Human Rights* (Clarendon 1995) 371.
[125] The HRC should not be confused with either the UN's Human Rights Council or its predecessor the Commission on Human Rights.
[126] ICCPR Article 28.
[127] David Harris, 'The International Covenant on Civil and Political Rights and the United Kingdom: An Introduction' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon 1995) 20.
[128] ICCPR Article 28.

any other entity."[129] In its actions, the HRC seeks to act by way of consensus, despite the fact that the Rules of Procedure provide for majority opinions.[130]

The HRC is in effect "the guardian of the [ICCPR], with responsibility for monitoring its implementation."[131] Neuman suggests that there are three main ways in which the HRC carried out its monitoring: "the examination of States' reports [a system known as Universal Periodic Review], the decision of individual communications, and the writing of General Comments."[132] However, some, including Joseph et al, justifiably add the class of inter-state complaints to the list, providing a fourth area of monitoring.[133] These four areas will be examined in turn.

Article 40 of the ICCPR governs the provision by states parties of reports to the HRC. These reports detail the measures which states parties "have adopted which give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of those rights"[134] and "indicate the factors and difficulties, if any, affecting the implementation of the [ICCPR]."[135] The reporting process is the "primary mode of interaction between states and the HRC".[136] States are required to submit a report within a year of the entry into force of the ICCPR in that state, and were initially required to submit a further report every five years.[137] Now, however, the HRC "has adopted a practice of stating, at the end of its concluding observations, a date by which the following periodic report should be

[129] Harris (n 127) 22. During the election of these individuals, "considerations shall be given to equitable geographic distribution of membership" to ensure that different cultures and legal systems are suitably represented by the HRC: ICCPR Article 31(2).
[130] UN Human Rights Committee 'Rules of Procedure of the Human Rights Committee' (11 January 2012) UN Doc CCPR/C/3/Rev.10, Rule 51. Note 1 to Rule 51 states that "The members of the Committee generally expressed the view that its method of work normally should allow for attempts to reach decisions by consensus before voting, provided that the Covenant and the rules of procedure were observed and that such attempts did not unduly delay the work of the Committee." Hereafter, HRC Rules of Procedure of 11 January 2012.
[131] Opsahl (n 124) 370.
[132] Neuman (n 45) 33.
[133] Joseph, Schultz and Castan (n 40) para 1.36.
[134] HRC Rules of Procedure of 11 January 2012, Rule 66.
[135] Article 40(2).
[136] Neuman (n 45) 32.
[137] Joseph, Schultz and Castan (n 40) para 1.37.

submitted."[138] This allows for a more targeted approach to be taken by the HRC to national reporting. Although the content of the reports is described in the ICCPR in "qualitative rather than quantitative" terms,[139] the HRC has provided guidance on what is expected in such a report.[140]

After a report has been submitted the HRC will notify the state of when the report will be examined, allowing the state to attend the meeting if desired.[141] Where the HRC has any concerns arising from the report it may request the attendance of a state's representative at a specific meeting. The representative "should be able to answer questions which may be put to that representative by the Committee and make statements on reports already submitted by the State party concerned, and may also submit additional information from that State party."[142] This highlights that the HRC seeks to operate by way of a constructive dialogue with states parties.[143] There are processes in place which allow the HRC to request extra reports where appropriate, or to raise the lack of provision of reports with individual states, but the HRC does not have any tools at its disposal to force states parties to comply with these requests.[144]

The ICCPR itself does not provide for individual communications to the HRC, this is provided for under the First Optional Protocol.[145] This empowers a state party to the protocol to recognise "the competence of the [HRC] to receive and consider communications from individuals".[146] When considering such communications

[138] UN Human Rights Committee 'Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights' (22 November 2010) UN Doc CCPR/C/2009/1, para 12.
[139] Opsahl (n 124) 400.
[140] For example, UN Human Rights Committee 'Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights' (22 November 2010) UN Doc CCPR/C/2009/1.
[141] HRC Rules of Procedure of 11 January 2012, Rule 68.
[142] ibid.
[143] This is the language used by the HRC itself, see, e.g., UN Human Rights Committee 'Working Methods' (Office of the High Commissioner for Human Rights) <www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx> accessed 18 December 2020.
[144] See Opsahl (n 124) 397–419 in particular for more discussion of this.
[145] (First) Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. Hereafter, Optional Protocol 1.
[146] Optional Protocol 1, Article 1. The procedural requirements are broadly similar to those under the ECHR, although, the requirement under the ICCPR, that domestic remedies have be

the HRC is not empowered to issue judgments, rather its decisions are referred to as "views".[147] These views are non-binding in nature as they lack the legal power of judgments; indeed domestic courts have frequently rejected any assertion that these views are binding.[148] The ICCPR itself, however, required all states parties to "ensure that any person whose rights or freedoms… are violated shall have an effective remedy".[149] The HRC has clarified this requirement in relation to Optional Protocol 1, saying:

> By becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.[150]

This clearly indicates the HRC's opinion that states parties will comply with its views and take action to remedy any violation of the ICCPR rights found. However, in practice, compliance with the HRC's views has not been very high, with one study putting the compliance rate at around 12 per cent, which the author acknowledges is "a low figure by any measure."[151] Thus, whilst in the HRC's view compliance should be mandatory, it demonstrably is not. As van Alebeek and

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exhausted prior to bringing a complaint is waived in cases where "the application of the remedies is unreasonably prolonged", Optional Protocol 1, Article 5(2)(b). The latter waiver has no equivalent under the ECHR.

[147] Optional Protocol 1, Article 5(4).

[148] For example, the Supreme Court of Ireland in *Kavanagh v Governor of Mountjoy Prison* (2002) 3 IR 97, para 36.

[149] Article 2(3).

[150] UN Human Rights Committee 'General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) UN Doc CCPR/C/GC/33, para 14. The equivalent power has been invoked under the ECHR, see *Ireland v UK* (App no 5310/71) [1978] ECHR 1.

[151] David C Baluarte and Christian De Vos, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (Open Society Foundations 2010) 119–120. This report, although from an NGO rather than the HRC, has been widely cited as accurate, see e.g., David Kosar and Jan Petrov, 'Determinants of Compliance Difficulties among 'Good Compliers': Implementation of International Human Rights Rulings in the Czech Republic' (2018) 29 European Journal of International Law 397.

Nollkaemper note, “there is a significant gap between the requirements under international law and the practice of states and their courts.”[152] In common with the reporting aspects of the HRC’s monitoring mechanisms, the implementation of these views is also pursued through dialogue and the HRC appoints a Special Rapporteur for follow-up of Views to carry out this dialogue and report to the HRC.[153] As of 2018, 116 states (from a total of 170 states party to the ICCPR) are also party to Optional Protocol 1, however, this does not include the UK.[154] In respect of Optional Protocol 1, the UK has noted that it:

> remains to be convinced of the added practical value to people in the United Kingdom of rights of individual petition to the United Nations. The United Nations committees that consider petitions are not courts, and they cannot award damages or produce a legal ruling on the meaning of the law, whereas the United Kingdom has strong and effective laws under which individuals may seek remedies in the courts or in tribunals if they feel that their rights have been breached.[155]

In addition to individual complaints, under Article 41 of the ICCPR, “A State Party… may at any time declare… that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.”[156] As the wording suggests, recognition of this power is optional. As of 2018, 50 states have made the optional declaration under Article

[152] Rosanne van Alebeek and André Nollkaemper, ‘The Legal Status of Decisions by Human Rights Treaty Bodies in National Law’ in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (Cambridge University Press 2012) 412. This issue is not examined further as the UK has not accepted the right to individual petition under Optional Protocol 1.
[153] HRC Rules of Procedure of 11 January 2012, Rule 101.
[154] UNGA ‘Report of the Human Rights Committee’ UN GAOR 73rd Session Supp No 40 UN Doc A/73/40, para 1. Country specific information regarding treaty status is available at <http://indicators.ohchr.org/> accessed 18 December 2020.
[155] UN Human Rights Committee ‘Seventh periodic reports of States parties due in July 2012: United Kingdom, the British Overseas Territories, the Crown Dependencies’ (29 December 2012) UN Doc CCPR/C/GBR/7, para 192.
[156] Article 41(1).

41, from a total of 170 states parties including the UK.[157] However, this process has never been initiated by a member state under the ICCPR.[158]

Finally, General Comments of the HRC evolved to allow for the HRC to comment on matters which are relevant to states parties to the ICCPR. To date 36 have been issued.[159] The majority of these have dealt with specific rights contained within the ICCPR itself, such as the right to life,[160] whilst some address a range of rights in relation to a specific topic, such as gender equality.[161] The remainder of these General Comments deal with other issues which the HRC deems to be important, for example, the nature of the legal obligations on states arising from the ICCPR.[162] Whilst these General Comments are not of themselves related to enforcement of the ICCPR, they "have proven to be a valuable jurisprudential resource" when interpreting the ICCPR.[163]

Despite a very challenging early negotiating period, and the splitting of the rights contained within the UDHR into two treaties, the ICCPR has shown itself to be an effective mechanism for the protection of human rights. Indeed, in the words of Keller and Moeckli, "the ICESCR and the ICCPR undoubtedly contribute to the

[157] UNGA 'Report of the Human Rights Committee' UN GAOR 73rd Session Supp No 40 UN Doc A/73/40, para 3. Country specific information regarding treaty status is available at <http://indicators.ohchr.org/> accessed 18 December 2020.
[158] Until 2018, it had never been used by states party of any of the UN human rights treaties which contain a similar provision, e.g., the Convention Against Torture. In 2018, however, "three inter-state communications were submitted under Article 11 of the Convention on the Elimination of All Forms of Discrimination", Office of the High Commissioner for Human Rights 'Human Rights Bodies – Complaints Procedures' <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate> accessed 18 December 2020. It is also the case that states would be able to raise a claim against one another at the International Court of Justice in relation to a treaty breach of this kind.
[159] The most recent being UN Human Rights Committee 'General Comment 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) UN Doc CCPR/C/GC/3. The text of all General Comments is available here: <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11> accessed 18 December 2020.
[160] ibid.
[161] UN Human Rights Committee 'General Comment No. 28: Article 3 (The equality of rights between men and women)' (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10.
[162] UN Human Rights Committee 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13.
[163] Joseph, Schultz and Castan (n 40) para 1.42.

powerful protection of human rights throughout the world."[164] In common with the ECHR, it is clear that the final text of the ICCPR was the result of a significant degree of compromise.

In the context of this thesis, the ICCPR is of great importance. It is in many ways similar to the ECHR, containing similar rights, and enjoying a similar, and in some ways shared, history. In other ways it is different, however, such as in the divergent enforcement mechanisms. Vitally, for the purpose of this thesis, the UK has opted not to incorporate the ICCPR into domestic law.[165] These similarities and differences are addressed in greater depth in the conclusion below.

4.5 Conclusion

This chapter has sought to show that both the ECHR and ICCPR are apt for comparison. It does not suggest that the two instruments are identical, but it has shown that they share a common history in the aftermath of the Second World War and protect a similar group of civil and political rights in respect of all those people within their jurisdiction, not just a limited group of persons. It has further demonstrated that, of the core UN treaties to which the UK is party, it is only the ICCPR which is a clear match for the ECHR. It is a comparison of these two instruments which will form the basis of the examination of the effects of incorporation on the effectiveness of international human rights treaties at protecting in dividual rights in England and Wales.

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[164] Helen Keller and Daniel Moeckli, 'Introduction' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present and Future* (Oxford University Press 2018) 4.

[165] No coherent justification has been provided for this refusal, and a number of draft bills of rights for the UK drew heavily on the ICCPR as well as the ECHR, recognising the difference in rights protection offered by both. See chapter 7. Higgins suggests that the reason for the ECHR being better understood and of greater concern when discussing incorporation in the UK might be due to UK's recognition of the right of individual petition to the ECtHR: "The fact that the European Court then may – and sometimes does, pronounce the United Kingdom to be in violation of the obligations, raises the profile of the European Convention in the United Kingdom, with the judiciary and indeed with the general public. By contrast, the United Kingdom has not accepted the right of individual application provided by the Optional Protocol to the [ICCPR]. No cases from the United Kingdom come before the Committee on Human Rights." Rosalyn Higgins, 'The Relationship between International and Regional Human Rights Norms and Domestic Law' (1992) 18 Commonwealth Law Bulletin 1268, 1270.

Both the ICCPR and ECHR are "milestones in the international community's post-war endeavours to strengthen the international protection of human rights and fundamental freedoms."[166] Although both contain similar rights,[167] some protections in the ICCPR are more progressive than their ECHR counterparts.[168]

As has been demonstrated, beyond their similar scope, they share a common background; indeed, it was the end of the Second World War and the establishment of the UN which "marks the birth of international human rights law in modern times."[169] In relation to this thesis, it is also noteworthy that the UK was involved in the development of both the ICCPR and ECHR. The UK's role was an important, if somewhat ambiguous, one in the development of the ECHR.[170] Likewise, the UK "played an active role in the drafting of the [ICCPR]".[171] Beyond the similarities between the two instruments, however, another clear justification for using the ICCPR and ECHR for comparison is that the HRC and the ECtHR "have developed into the most prominent and by far the most experienced bodies supervising the implementation of international and regional human-rights standards."[172] The breadth of experience of these bodies provides a wealth of material, ranging from judgments of the ECtHR to reports of states parties to the HRC, which can be used to analyse the two instruments in relation to one another, and to the UK.

One difference between the two instruments relates to the legal authority of decisions taken by the monitoring bodies, the HRC and the ECtHR. Whilst the views of the HRC are not legally binding, unlike judgments of the ECtHR, "states are under the obligation to take the HRC's final views into consideration."[173]

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[166] Schmidt (n 33) 629.
[167] As demonstrated in the comparison table above.
[168] Schmidt (n 33) 629.
[169] Bates (n 46) 33.
[170] Marston (n 55).
[171] Dominic McGoldrick and Nigel Parker, 'The United Kingdom Perspective on the International Covenant on Civil and Political Rights' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon 1995) 69.
[172] Schmidt (n 33) 658. Although, as was noted above, compliance with the HRC's views remains poor.
[173] European Commission for Democracy Through Law, 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' (Study No 690/2012, Council of Europe, 2014) Doc CDL-AD(2014)036 para 78.

Moreover, as noted above, "pursuant to article 2 of the [ICCPR], the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established."[174] Thus, it is clearly the view of the HRC that that states parties should comply with their views and take action to remedy any violation of the ICCPR rights found. However, in practice, compliance with the HRC's views is low,[175] and there exists a significant gap between the legal requirements and actual practice.[176] Taken together it is impossible to argue that there is consensus that the HRC's views are legally binding.[177] By comparison there is no question that judgments of the ECtHR are binding upon the states at which they are directed.

Another, more significant difference between the ECHR and ICCPR, with respect to the UK, is in relation to the right to individual petition. Whilst the UK "took part in the drafting of [Optional Protocol 1]… it did not sign it and has not ratified it."[178] The ostensible justification for this has been that "in some respects [the rights to petition] compares unfavourably from the individual's standpoint with the procedure established by Article 25 of the [ECHR]".[179] However, this significant difference in enforcement mechanism is of limited importance to this thesis as it examines the effect at a national, rather than international level; thus, this difference does not preclude a fruitful comparison of the two instruments.[180]

As outlined above, this thesis makes use of a comparison between two human rights treaties in the context of England and Wales, one incorporated and one unincorporated. With their obvious similarities the ECHR and ICCPR are ideal

[174] UN Human Rights Committee 'General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) UN Doc CCPR/C/GC/33, para 14.
[175] Baluarte (n 151) 119–120.
[176] van Alebeek and Nollkaemper (n 152) 412.
[177] This issue is not centrally important to this thesis as the UK has not accepted the right to individual petition and thus will not be faced with the views of the HRC in this context.
[178] McGoldrick and Parker (n 171) 83.
[179] HC Deb 8 February 1979, vol 962, col 262. This view was reiterated a decade later in the House of Lords, HL Deb 28 March 1989, vol 495, col 591.
[180] Although it is noted in the conclusion that the difference of enforcement mechanism ought to be examined in further research.

candidates for this comparison, and whilst differences between the two exist, they are unlikely to cause any significant difficulty with regard to this thesis.

5. The Interaction between Domestic Law and International Law

5.1 Introduction

This chapter examines the difference between two constitutional approaches: monism and dualism.[1] An understanding of these differing outlooks is central to this thesis, as the dualist approach, which operates in the UK amongst other countries, stipulates that domestic legislative action is needed for international law to apply within the state.[2] The issue of incorporation is central to the research question underlying this thesis, as it examines whether incorporation of the European Convention of Human Rights has secured better judicial enforcement of human rights in England and Wales.[3]

This chapter opens with an overview of the monist and dualist approaches, examining both in the general sense. This will serve to look at the theory behind each, and the general practices which have emerged from these. Next, the chapter will move from the general to the specific in order to assess the UK's dualist approach to international law as it applies to England and Wales. It will examine how dualism interacts with the UK's constitutional framework, in particular parliamentary sovereignty, as this assists in explaining why the UK is a dualist nation. The UK's constitutional framework is at variance with the majority of nations in the world. Its idiosyncratic arrangement requires some unpacking prior to the substantive analysis of the UK's human rights law during the three phases under investigation in the subsequent chapters of this thesis. To that end,

[1] Although some commentators argue other theories exist which seek to explain the interaction of national and international law, Denza suggests that monism and dualism have been "most persistent". Eileen Denza, 'The Relationship Between International and National Law' in Malcolm Shaw (ed), *International Law* (5th edn, Oxford University Press 2018) 388. Klabbers, by contrast with Denza, agures that "The two theories exhaust the matter", although he does accept that there is a wide degree of variation in the way in which they apply to individual states. Jan Klabbers, *International Law* (2nd edn, Cambridge University Press 2017) 322.

[2] Although there are many ways of referring to the divide, this thesis adopts the language of 'international' and 'domestic', as it is clearer than 'municipal', 'national', etc.

[3] Although there has been some debate about whether or not international human rights treaties are a special case in that they may not need to be incorporated to be applied directly by the courts of England and Wales, this is not a view which currently prevails and consequently is not addressed in this chapter. For further discussion of this issue see Philip Sales and Joanne Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 Law Quarterly Review 388, 388–340.

the section of this chapter which relates to dualism in the UK examines the UK's constitutional arrangements in some depth before turning to investigate how the dualist approach is applied by the UK, with specific reference to treaties.[4] Where the UK constitution is discussed here it is done with a focus on the way it operates in England and Wales.

In the wider context of this thesis, this chapter, along with the preceding chapter on international human rights instruments, provides the necessary doctrinal background to begin the subsequent, more quantitative chapters which examine the human rights landscape in England and Wales over the three stages, as outlined within the methodology.

5.2 Dualism and Monism

This section addresses the differences between monist and dualist domestic legal systems in the general sense. The difference between the two approaches has been described as "one of the most pressing issues of modern international law", with Nijman and Nollkaemper going on to describe "the disconnection, or 'divide' between the international legal order, on the one hand, and the legal orders of over 190 sovereign states on the other."[5] As outlined in the introduction, an understanding of this divide is helpful as it allows for an explanation of the UK's own dualist approach against the backdrop of its international obligations in respect of human rights.

The foundation of the debate on monism and dualism in Europe is, arguably, best understood in the context of the time at which it was at its height, between the two world wars; that is, between 1918 and 1939. As Nijman and Nollkaemper note, at this point in Europe's history "for many, the principle concern was the

[4] For the purposes of this chapter the definition of treaty is taken from the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331, Article 2(1)(a), to mean "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

[5] Janne Nijman and André Nollkaemper, 'Introduction' in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) 1.

post-World War I crisis of democracy and its dangers for individual freedom."[6] In this sense, the monist view departs from the traditional legal thinking prevalent prior to that point in time, which viewed international law as being solely concerned with the relationship between states; rather, monism focuses on the position of the individual within the international legal sphere.[7] Similarly, writing in 1936, Starke noted that while the monism-dualism debate was not a new discourse even then, it had been "brought to the fore in recent times by the growth of modern constitutions and their necessary modification in order to function in an international society." [8]

Before examining these competing approaches, it is worth noting that neither is to be preferred over the other. Indeed, "international law does not itself prescribe how it should be applied or enforced at a national level", and "National constitutions are… free to choose how they give effect to treaties".[9] Thus, it remains an issue for the constitutional arrangements of individual states as to how the interaction between international and domestic law should operate.

5.2.1 Dualism

Although monism is the older of the two approaches, dating back at least to the time of the 16th century Catholic writers, dualism, dating as it does to the 18th century, cannot be described as a modern phenomenon.[10] Dualism quickly took hold and has been described as "predominant in orthodox 19th century international law theory".[11] The dualist approach grew out of the thinking of philosophers, such as Hegel, who put the sovereignty of the state at the centre of international law. Indeed, Hegel argued that "The state in and by itself is the ethical whole, the actualization of freedom; and it is an *absolute* end of reason that freedom should be actual."[12]

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[6] ibid 6.
[7] ibid.
[8] Joseph G Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 British Yearbook of International Law 66, 66–67.
[9] Denza (n 1) 383.
[10] Starke (n 8) 67–68.
[11] Nijman and Nollkaemper (n 5) 7.
[12] TM Knox (ed), *Hegel's Philosophy of Right* (Oxford University Press 1967) 279. Quoted in Nijman and Nollkaemper (n 5) 7. Emphasis in original.

Unsurprisingly, in light of the Hegelian philosophy of the state underpinning it, dualism holds that "international law and [domestic] laws are viewed as separate legal systems, which may be defined as self-contained, because within each system the only existing rules are those that are part of the system."[13] In the dualist approach, international law applies to the relations between states, whilst national law applies to the relationship between the state and its citizens. Thus, where a conflict exists between national law and international law, "the dualist would assume that a national court would apply national law, or at least that it is for the national system to decide which rule is to prevail."[14] In a dualist state, for the law contained in a treaty to be applicable in domestic courts "it is necessary for a treaty to be incorporated into a State's legal system so that it can take effect at a national level… once a provision of a treaty is implemented into national law, it is applied by national courts as any other [domestic] provision and not as an international one."[15] As Jackson explains, this means that if there is a particular protection or privilege afforded to individuals by a treaty, an individual cannot raise a claim in the domestic courts based upon this protection as it does not form part of domestic law, unless and until it has been incorporated into domestic law.[16]

It is important to note, however, that a broad generalisation should not be made from such a description of dualism. Crawford asserts that "Each legal system has, almost by definition, its own approach to the others".[17] Moreover, it would be erroneous to suggest that national and international law are totally cut off from one another in dualist systems. As Gaja notes, "Rules which are not created within [one] system may nevertheless be relevant for the system if they are referred to by a rule included in the system."[18] It is to fair say, then, that there can

[13] Giorgio Gaja, 'Dualism – a Review' in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) 52.
[14] James Crawford, *Brownlie's Principles of International Law* (8th edn, Oxford University Press 2008) 48.
[15] Alina Kaczorowska, *Public International Law* (4th edn, Routledge 2010) 147.
[16] John H Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) 86 American Journal of International Law 310, 314.
[17] Crawford (n 14) 50.
[18] Gaja (n 13) 53.

be no single, all-encompassing definition of dualism as it applies in all dualist states.[19] Instead, dualism varies from one constitutional system to another. As such, the terms dualism and monism serve as a shorthand, highlighting the means by which a country engages with international law.

As noted above, in dualist systems it is generally necessary to incorporate international law into domestic law before it can take effect at the domestic level.[20] However, it is not always necessary for the law to change in response to a country ratifying a treaty.[21] It is possible for dualist states to take little or no legislative action in response to ratification of a treaty where domestic law already achieves the aims of that treaty. As was pointed out by Lang, "Many treaties – even some with major policy implications – require only minor adjustments to domestic law, or none at all".[22] For example, in the UK context, compliance with "the 2013 Arms Trade Treaty needed only adjustments to secondary legislation."[23]

Where domestic law does not achieve the obligations arising from a newly ratified treaty, however, domestic action will be required. There are a number of ways in which this can be carried out. The most widely used are "transformation", "adaption" and "adoption".[24] Transformation is where "the text of an international treaty is literally 'incorporated' into a statute or another source of domestic law."[25] So, for example, a state can simply enact domestic legislation to which a treaty

[19] It is for this reason that the application of the dualist approach in the UK is considered separately in this chapter.
[20] For the purposes of this thesis 'incorporation' is taken to mean the transfer of an international legal obligation into the domestic legal order by one means or another. Customary international law is often treated differently. It is sometimes possible for international law to inform the exercise of domestic law such as aiding in interpretation of statute (see, in respect of the ECHR and the UK courts' reasoning, chapter 7).
[21] The UK, for example, believed that there would be no issues between its domestic law and the ECHR. This is discussed in, e.g., AW Brian Simpson, *Human Rights and the End of Empire* (Oxford University Press 2001); Ed Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press 2010).
[22] Arabella Lang, 'Briefing Paper: Parliament's Role in Ratifying Treaties' (House of Commons Library 2017) CBP 5855 9.
[23] ibid.
[24] European Commission for Democracy Through Law, 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' (Study No 690/2012, Council of Europe, 2014) Doc CDL-AD(2014)036 para 23. There is a range of terminology in respect of the manner in which international obligations can become part of domestic law. For the purposes of this thesis these terms are used.
[25] ibid.

is annexed, thereby bringing it into domestic law.[26] Self-evidently, this is the easiest route to adopt as it requires no change to the text of the treaty. Klabbers does, nonetheless, caution that this approach is not without risk as linguistic differences may still present problems with interpretation.[27] Adaptation is similar to transformation in that it incorporates the international legal obligations into domestic law. This approach, however, involves "substantive modifications" to the text of the treaty.[28] Klabbers warns, this is "cumbersome" and can be risky as it allows national and linguistic sensitivities to come into play, potentially distancing the domestic legal framework from the treaty.[29] Adoption means "the use of provisions of international treaties, or other sources of international law, in the case-law of national courts, in cases where such sources were not transformed and/or adapted within the domestic legal order."[30] As is demonstrated in chapter 7 of this thesis with regard to the ECHR, judicial application of international law in this manner can be inconsistent and is dependent on the willingness of the court to engage with the issue of international law.[31]

A problem faced by dualist systems is that a decision to incorporate, or not, does not alter the legal obligation deriving from a treaty at the international level. As Jackson highlights, "It should be quickly noted that even if a treaty norm does not prevail as a matter of domestic law, it will likely still be 'in force' as a matter of international legal obligation."[32] He goes on to note that "In that case the acting nation is still 'liable,' as a matter of international law, to the contracting parties of the treaty. However, *international* processes would have to be invoked to

[26] As happened with the ECHR under the Human Rights Act.
[27] Klabbers (n 1) 328.
[28] European Commission for Democracy Through Law (n 24) para 23. The report notes that "A classic example of an adapted international treaty is the United Kingdom Human Rights Act of 1998, which introduced within the law of the United Kingdom some of the provisions of the European Convention on Human Rights, but cannot set aside conflicting domestic law."
[29] Klabbers (n 1) 327.
[30] European Commission for Democracy Through Law (n 24) para 23.
[31] To this end, the courts of dualist countries have in some cases expressed a view that they will seek insofar as possible to assist in compliance with these international obligations. See, e.g., *Ex p Guardian Newspapers Ltd* [1999] 1 WLR 2130, [17], per Brooke LJ. There the court noted that "It appears to us that we ought to interpret the relevant rules purposively in order, if possible, to comply with the clear intention of Parliament that our national law and procedures should be altered in order to bring them in line with the [ECHR]".
[32] Jackson (n 16) 313.

'enforce' the treaty obligation."[33] Clearly, therefore, dualist nations must be alive to the fact that they may be liable for obligations internationally which cannot be met without some form of incorporation taking place. Indeed, the Vienna Convention on the Law of Treaties makes this clear in Article 27, which states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[34] Thus, for the purposes of this thesis it is important to note that once a country becomes a party to an international human rights treaty, the obligations arising from that treaty bind the state at an international level.

Dualism, therefore, seeks to allow states to maintain sovereignty over their domestic legal systems and also allows a flexibility of approach towards incorporation. Moreover, as has been noted, this flexibility means that the practicalities of how dualism operates in one dualist state may bear little resemblance to another dualist state's approach. This chapter next looks at the monist approach in detail.

5.2.2 Monism

Crawford's description of monism is helpful as a succinct starting point for this examination of monism. He describes monism as postulating "that national and international law form one single legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent."[35] This means that international law can be invoked directly within a state without the necessity of action at a domestic level. As Higgins points out, "For the monist, international law is part of the law of the land alongside labour law, employment law, contract law, and so forth."[36]

As outlined already, monism is the older of the two approaches. Despite this, however, both Klabbers and Crawford credit Kelsen with the formulation of a

[33] ibid 318. Emphasis added.
[34] For the purposes of this thesis it is useful to note that the UK is party to the Vienna Convention on the Law of Treaties, it signed the Treaty on 20 April 1970 and ratified it on 25 June 1971.
[35] Crawford (n 14) 48.
[36] Rosalyn Higgins, *Problems & Process* (1994) 205.

modern, clearly articulated monist theory of international law in his work *General Theory of Law and State* published in 1945.[37] Kelsen explained that "Since the basic norms of the national legal orders are determined by a norm of international law, they are basic norms only in a relative sense."[38] Indeed, he goes on to say that "It is the basic norm of the international legal order which is the ultimate reason for the validity of the national legal orders, too."[39] Whilst it is the case that Kelsen is largely responsible for the modern understanding of monism, it is interesting to note that Starke traces monism back to the early Catholic writers, such as Suarez and Bodin, who "adopted a conception of state sovereignty which they were careful to reconcile with a monistic construction of law in general."[40]

Although it is Kelsen who is seen as a leading proponent of monism, he was not alone in his view that dualism as a doctrine was not an ideal way in which to understand the interaction between these two legal planes, particularly as the world became increasingly internationalised in the 20th century. Lauterpacht, arguing from a rights-based standpoint, also took the view that a monist approach was to be preferred, arguing that:

> …the recognition of the individual, by dint of the acknowledgement of his fundamental rights and freedoms, as the ultimate subject of international law, is a challenge to the doctrine [dualism] which in reserving that quality exclusively to the State tends to the personification of the State as being distinct from the individuals who compose it, with all that such personification implies.[41]

In common with the preceding section on dualism, it is important to highlight that this description is general in its outlook and that there are differences between how monist states behave in relation to international law. Finally, it is worth noting that it is overly simplistic to assume that no action whatsoever needs to be taken in monist states for compliance with international law to be effected. As Cassese

[37] Crawford (n 14) 49; Klabbers (n 1) 322. Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945).
[38] Kelsen (n 37) 367.
[39] ibid.
[40] Starke (n 8) 67.
[41] Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950) 70.

notes, “many states fail to translate international rules into [domestic] legislative commands so as to make those rules operational.”[42]

Whilst the terminology of monism and dualism is still the most widely understood and used language to explain the relationship between domestic and international law, it is not without its critics. One such critic is von Bogdandy, who argues that:

> …if one compares the contemporary situation with that of one hundred years past, almost every relevant element has changed: the nation-state's evolution in tandem with the process of globalization; the gradual elaboration of international law; the emergence of general constitutional adjudication; and, above all, positive constitutional provisions on the role of international law within domestic systems.[43]

He goes on to suggest that the language of monism and dualism does not reflect the reality of today, nor does it actually help to solve any of the legal problems posed by the relationship between international and domestic law. However, not only is the monist and dualist debate still at the heart of our understanding of the divide between domestic and international law, but also it is still engaged with by highly regarded scholars in the field of international law. For example, in the last decade both Cassese and Gaja have written in support of monism and dualism respectively.[44] Thus, whilst some may argue that the debate is passé, it is still very much part of the ongoing discussion in relation to both international and domestic law. Importantly, it also provides useful insights which aid in answering the research question at the core of this thesis.

[42] Antonio Cassese, ‘Towards a Moderate Monism: Could International Rules Eventually Acquire the Force to Invalidate Inconsistent National Laws?’ in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012) 188. Emphasis omitted.
[43] Armin von Bogdandy, ‘Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law’ (2008) 6 International Journal of Constitutional Law 397, 400.
[44] Cassese (n 42); Gaja (n 13). Cassese’s chapter was published posthumously.

5.3 The UK Constitution

This chapter now turns to examine the application of dualism in the UK's legal system, as it applies in England and Wales. It first provides an analysis of the key feature of the UK's constitution: the doctrine of parliamentary sovereignty. This is explained in some depth as it is central to understanding dualism in the context of this thesis. In contrast to the vast majority of countries in the world, the UK lacks a single, written constitutional document.[45] That is not to say, however, that the UK lacks a constitution. What it lacks "is not a written constitution but a *codified* Constitution".[46] The lack of a single document encapsulating the all the constitutional norms of the UK means that there is room for debate and discussion on what exactly forms part of the constitution, and how it operates. This section will examine the UK's constitutional arrangements in order to provide an overview of how the constitution interacts with the laws passed by Parliament, and by extension to the relationship between domestic and international law in the context of England and Wales.[47] At the outset it is important to highlight that the reason international law, in the form of treaties, cannot have effect in the UK, and thus in England and Wales, without incorporation is because of the doctrine of parliamentary sovereignty. For this reason, the UK constitution is discussed in some depth; this discussion also serves to highlight how many of the key constitutional texts and instruments are focused on England and Wales.

The "British Constitution, having evolved over centuries… is the product of a long period of kingly rule, parliamentary struggle, revolution, many concessions and compromises, a slow growth of custom, the making and breaking and alteration of many laws."[48] Dicey, the author of a seminal work on constitutional law in England and Wales, *Introduction to the Study of the Law of the Constitution*,

[45] Both New Zealand and Israel also lack a "traditional" written constitution.
[46] Anthony King, *The British Constitution* (Oxford University Press 2007) 5. Emphasis in original.
[47] The term "sovereignty" is used throughout, however, some commentators, including Ellis, suggest that "supremacy" is a more accurate word given certain inherent limitations in the system: "'supremacy' connotes a body… hierarchically above all others… which has greater authority than… its rivals." Whilst "'sovereignty' on the other hand, suggests omnipotence". Evelyn Ellis, 'The Legislative Supremacy of Parliament and Its Limits' in David Feldman (ed), *English Public Law* (2nd edn, Oxford University Press 2009) para 2.141.
[48] Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 48.

asserted that there are two pillars of the constitution: "sovereignty of parliament and the rule of law."[49] Of these two, parliamentary sovereignty is of relevance to the discussion of the UK's dualist approach to international law.

In *Introduction to the Study of the Law of the Constitution* Dicey defined parliamentary sovereignty as meaning:

> neither more nor less than this, namely, that Parliament… has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament.[50]

The doctrine of parliamentary sovereignty itself predates Dicey. Indeed, it is often accepted that the origin of the modern concept of parliamentary sovereignty was the 1689 Bill of Rights.[51] Although "Blackstone (and Dicey, following him) [locates] parliamentary sovereignty in fifteenth-century decisions by judges that they have no power to inquire into the internal affairs of parliament" suggesting that the 1689 Bill of Rights was less revolutionary than we might currently suppose.[52] Irrespective of which version is correct, it is clear that the concept of parliamentary sovereignty is not a recent development. It was not, however, until the nineteenth century that the concept was outlined in its modern sense with greater clarity.[53]

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[49] Jeffrey Jowell, 'The Rule of Law' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, Oxford University Press 2015) 13.

[50] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th revised edn, first published 1885, Liberty Fund Incorporated 1982) 3–4. It is important to mention at this point that Dicey's use of the word "parliament" is taken to mean collectively the Houses of Lords and Commons and the Crown acting together. This has been pithily summarised by Bogdanor as meaning "what the Queen in Parliament enacts is law." Vernon Bogdanor, 'Our New Constitution' (2004) 120 Law Quarterly Review 242, 259.

[51] Elizabeth Wicks, *The Evolution of a Constitution* (Hart Publishing 2006) 19.

[52] Iain McLean, *What's Wrong with the British Constitution?* (Oxford University Press 2010) 20.

[53] Although many sources suggest 1689 as the birth of parliamentary sovereignty Mitchell, amongst others, suggests that "any clear doctrine of the Sovereignty of Parliament… came into being… at earliest in the late Eighteenth Century or even in the first half of the Nineteenth." JDB Mitchell, 'What Happened to the Constitution on 1st January 1973?' [1980] Cambrian Law Review 69, 71.

In the intervening years Dicey's formulation has almost universally prevailed.[54] Indeed, in a number of widely examined cases, the judiciary expressly endorsed the Diceyan doctrine of parliamentary sovereignty. For example, Avory J stated: "for myself, I should certainly hold, until the contrary were decided, that no Act of Parliament can effectively provide that no future Act shall interfere with its provisions."[55] A view endorsed by Maugham LJ in *Ellen Street Estates*.[56] Nor was this a view held solely by the judiciary. Commentators, such as Wade, described the Diceyan account of parliamentary sovereignty as that which would be espoused by any "orthodox English lawyer".[57] It was not until later on in the twentieth century that the doctrine was revisited and examined, in particular in relation to the UK's accession to the European Economic Community (EEC, now the EU),[58] the granting of independence to former colonies, and devolution.

In 1973 the UK acceded to the EEC. This accession was facilitated by the European Communities Act 1972.[59] This Act was, for a long time, the subject of debate as it seemed to give the courts the power to disregard the will of Parliament. It did this by allowing the courts to interpret legislation in a manner compliant with EU legislation, thus giving wide power to the courts to interpret legislation contrary to the intention of Parliament.[60] Matters came to a head in the *Factortame* litigation,[61] which related to the fishing rights of European vessels in UK waters. The Merchant Shipping Act 1988 was held to be incompatible with European law and was "disapplied".[62] Thus the Parliament of 1972 had succeeded in preventing a subsequent, validly enacted Act of Parliament from being enforced. There are, however, two ways of interpreting this decision. The first is the revolutionary manner, suggested above, that Parliament had bound its

[54] See, e.g., Lord Steyn in *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 who acknowledged the central role of the doctrine in the UK's constitution.
[55] *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733, 743.
[56] *Ellen Street Estates v Minister for Health* [1934] 1 KB 590, 597.
[57] HWR Wade, 'The Basis of Legal Sovereignty' [1955] Cambridge Law Journal 172, 174.
[58] The UK has since left the EU, UK membership of the EU ceased on 31 January 2020.
[59] The 1972 Act has now been repealed by the European Union (Withdrawal) Act 2018 as part of the UK's withdrawal from the EU.
[60] European Communities Act, s 2(1) and (4).
[61] In particular: *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603.
[62] ibid 609.

successors.[63] The second is that the UK voluntarily chose to cede partial sovereignty to Europe for as long as membership of the EU continued: had Parliament of 1988 wished to enact the Merchant Shipping Act and repeal the 1972 Act this would have been possible, at least legally. It seems, on the basis of comments made by judges in England and Wales, that this would require express repeal. Denning MR asserted that "If the time should come when our Parliament deliberately passes an Act – with the intention of repudiating the Treaty or any provision in it – or intentionally of acting inconsistently with it – and says so in express terms – then I should have thought that it would be the duty of our courts to follow the statute of our Parliament."[64]

The independence of former colonies is also an area which demonstrates the practical difficulties of the strict legal operation of parliamentary sovereignty. This is because it would be practically impossible for Parliament to repeal an Act which provided for devolution or independence to such a state. In purely theoretical terms it would be possible for Parliament to repeal the Kenya Independence Act 1963. However, in practical terms this is an untenable proposition as the status of Kenya as a sovereign nation could not be altered by legislation passed in the UK Parliament.

Additionally, it is helpful to map the general philosophical arguments which underpin the doctrine of parliamentary sovereignty. Goldsworthy observes that the common starting point for the doctrine is the “Hobbesian theory that at the foundation of every legal system there is a ‘sovereign’, who is the creator of all power and whose power is therefore above the law.”[65] There are clear parallels here with Hegel’s pronouncements on state sovereignty, outlined above. As Parliament cannot confer absolute power upon itself, as to do so would require the existence of such power in the first place, as Fitzgerald argued,[66] it must derive from a different source. The court in *Jackson* stated that Parliament’s

[63] This is the language employed in HWR Wade, ‘Sovereignty – Revolution or Evolution’ (1996) 112 Law Quarterly Review 568.
[64] *Macarthys Ltd v Smith* [1979] ICR 785, 789 (Denning MR).
[65] Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Clarendon 1999) 236.
[66] PJ Fitzgerald, *Salmond on Jurisprudence.* (12th edn, Sweet and Maxwell 1966) 111.

power is derived from the common law.[67] Munro has previously explained this, noting that as the legal system in England and Wales recognises no other law than the common law or law derived from statute then, as Parliament's "powers do not come from statute, then they must be part of the common law".[68]

Hart, however, argues that parliamentary sovereignty is governed by the rule of recognition. If something is accepted and treated as a rule by the judiciary and those involved in the legal system, then it is from the recognition that the rule derives its force.[69] It, therefore, does not follow logically in Hart's analysis that the judiciary created, by themselves, the principle of parliamentary sovereignty.[70] Winterton argues that parliamentary sovereignty is "a unique hybrid of law and political fact deriving its authority from acceptance by the people and by the principle institutions of the state".[71] This resembles Hart's rule of recognition but is, arguably, more overt in accepting that the exact derivation of parliamentary sovereignty is, ultimately, unclear.

Undoubtedly, by the 1990s there had been much debate surrounding the operation of parliamentary sovereignty. Indeed, there had already been some divergence from the strict Diceyan doctrine by way of the 1972 European Communities Act and the plethora of legislation relating to issues such as the granting of independence. However, parliamentary sovereignty, as formulated by Dicey, remains the default position for understanding the UK's constitutional arrangements and has informed the UK's approach towards international law, and thus the approach in England and Wales.

5.4 Dualism in the UK

This section turns to examine how dualism operates in the UK, and in particular in England and Wales. It does this in order to inform the examination, in

[67] *R (Jackson) v Attorney General* (n 54) [102].
[68] CR Munro, *Studies in Constitutional Law* (Butterworths 1987) 103.
[69] HLA Hart, *The Concept of Law* (Clarendon 1961) 117.
[70] Goldsworthy (n 65) 242.
[71] G Winterton, 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in C Sampford and K Preston (eds), *Interpreting Constitutions: Theories, principles and institutions* (Federation Press 1996) 136.

subsequent chapters, of the effect of incorporation of international human rights law in England and Wales. Although this chapter has already provided a brief general description of both monism and dualism, as was highlighted above, these labels do not provide a finite definition, rather they function "as shorthand indications of the general approach within a particular state."[72] Therefore, in order to understand a country's approach in an accurate sense, it is necessary to look at that country in greater detail. In examining dualism, this section focuses on treaty law.[73]

The UK has been described by Crawford as "a strongly dualist system".[74] The existing position in relation to the place of treaties in UK law is summarised in Halsbury's Laws of England:

> Treaties are not directly applicable in the United Kingdom, and the courts do not have any inherent power to enforce treaty rights or obligations. Where the purpose and intended effect of a treaty necessitates legal changes in the United Kingdom, these must be implemented by Act of Parliament. The courts may, however, rely upon a treaty as an aid to construction in their interpretation of domestic statutory provisions.[75]

This position has also been asserted by Privy Council. There, Lord Millet noted that the court recognised "the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation."[76] More recently a definition of dualism was provided by the Supreme Court. In *Miller* the court noted that:

> Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative

[72] Denza (n 1) 388. This view is shared by Crawford: Crawford (n 14) 50.
[73] Peremptory norms (*jus cogens*) are not discussed. As Shelton notes these are "automatically binding, irrespective of a state's consent or domestic legal order – creating a sub-category of monist norms even for dualist systems." Dinah Shelton, 'Introduction' in Dinah Shelton (ed), *International Law and Domestic Legal Systems* (Oxford University Press 2011) 2. Similarly, customary international law is not discussed as this thesis focuses on human rights treaties. For discussion of the sources of international law as they relate to incorporation see, e.g., Shelton.
[74] Crawford (n 14) 63.
[75] *Halsbury's Laws* (5th edn, 2014) vol 20, para 556.
[76] *Thomas v Baptiste* [2000] 2 AC 1 (PC), 23.

> authority and that the exercise of that power is not reviewable by the court… This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state… The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.[77]

As was previously asserted, the reason that international law, in the form of treaties, cannot have effect in the UK, and thus England and Wales, without incorporation is because of the doctrine of parliamentary sovereignty. Indeed, as Shaw notes, "as far as this topic is concerned, [the UK's dualist approach] seems to turn more upon the particular relationship between the executive and legislative branches of government than upon any preconceived notions of international law."[78]

The power to enter into a treaty rests with the Crown. As a matter of legal theory, "the Sovereign could enter a treaty in person", in practice, though, that power is now exercised on the Crown's behalf, most commonly by the Secretary of State for Foreign Affairs or another senior member of Government.[79] Given that members of the Government are also members of the legislature (i.e. one of the Houses of Parliament) the exercise of this prerogative power is effectively a legal fiction, but one which endures.[80] However, as Lord Templeman noted in *J H Rayner v Department of Trade and Industry*: "the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament."[81] Thus, whilst the power to

[77] *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5, [55]. Per Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, and Lord Hodge.
[78] Malcolm Shaw, *International Law* (8th edn, Cambridge University Press 2017) 113.
[79] R Higgins, 'United Kingdom' in Francis G Jacobs and Shelly Roberts (eds), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell 1987) 123.
[80] In relation to royal prerogative see *Halsbury's Laws* (n 75) para 166 et seq.
[81] *J H Rayner v Department of Trade and Industry* [1990] 2 AC 418, 500.

enter into a treaty remains with the Crown, it is for Parliament to decide how domestic law should reflect treaty obligations.

Although Parliament has no formal role in the decision to sign a treaty, historically it has still been involved in the ratification process.[82] Parliamentary involvement in the ratification process was, from 1924, governed by the so-called Ponsonby Rule. This stated that the Government would "lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty will be ratified".[83] This rule was formalised in the Constitutional Reform and Governance Act 2010 (CRAG). The first part of s 20 of CRAG stipulates that:

> (1) Subject to what follows, a treaty is not to be ratified unless –
>
> > (a) a Minister of the Crown has laid before Parliament a copy of the treaty,
> > (b) the treaty has been published in a way that a Minister of the Crown thinks appropriate, and
> > (c) period A has expired without either House having resolved, within period A, that the treaty should not be ratified.
>
> (2) Period A is the period of 21 sitting days beginning with the first sitting day after the date on which the requirement in subsection (1)(a) is met.

It is worth noting that under the CRAG process there does not need to be *approval* of the treaty's ratification, rather the absence of an objection by Parliament to ratification. As Barrett notes, rather than require parliamentary consent "The Act… sets out the legal consequences in the event of a vote by either House *against* ratification."[84]

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[82] Although the practical value of this involvement has been questioned, even under the current framework. Thus, Smith, Bjorge and Lang asserted that "The UK has never had effective scrutiny of the government's treaty behaviour." Ewan Smith, Eirik Bjorge and Arabella Lang, 'Treaties, Parliament, and the Constitution' [2020] Public Law 508, 508.
[83] HC Deb 1 April 1924, vol 171, col 1999.
[84] Jill Barrett, 'The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms' (2011) 60 International & Comparative Law Quarterly 225, 227. Emphasis added.

Although CRAG appears *prima facie* to allow Parliament to reject ratification of the treaty, in exceptional cases such a rejection can be overridden.[85] As Smith, Bjorge and Lang note "If a resolution is passed in either House during this period which disapproves of ratification, the government must then state why it nevertheless wishes to ratify."[86] If such a resolution is passed by the House of Commons it "triggers another 21 sitting day period during which the treaty may not be ratified. In theory, the process can repeat indefinitely."[87] By contrast, the House of Lords enjoys no such power.[88] If only the House of Lords resolves against ratification "the negative vote is not conclusive as to the possible ratification of the treaty in question."[89] If there is a negative vote in the House of Lords the Government could simply lay "a statement (before both Houses of Parliament) explaining why the Government still believes the treaty should be ratified in spite of the negative vote in the Lords. Having done this, the Government could proceed to ratify the treaty without further delay."[90] Given that, in the case of the Commons, this power to reject ratification amounts to little more than a stalling mechanism, and that the power of the Lords is advisory rather than binding, it is perhaps unsurprising that a resolution disapproving ratification has not yet been made.[91]

Irrespective of how a treaty has been ratified, in order for a treaty to take effect in domestic law incorporation is necessary in order to respect the doctrine of parliamentary sovereignty, as has already been demonstrated. Although this is the case, there are no requirements about *how* the treaty can, or indeed should, be incorporated into domestic law. Incorporation can take place in the same way

[85] CRAG s 22. Lang notes that "There is no indication in the 2010 Act of what might constitute an exceptional case. Emergencies are likely to be the main examples, but the Government is free to designate anything an exceptional case." Lang (n 22) 14.
[86] Smith, Bjorge and Lang (n 82) 511.
[87] ibid.
[88] "The reason for giving a blocking power to the House of Commons but a delaying power only to the House of Lords was to 'respect the primacy of the House of Commons, while recognizing the importance of the role of the Lords in treaty scrutiny.'" Barrett (n 84) 228. Barrett quotes the Ministry of Justice, *The Governance of Britain – Constitutional Renewal* (White Paper, CM 7342-I, 2008) para 158.
[89] ibid.
[90] ibid.
[91] Smith, Bjorge and Lang (n 82) 511.

as any other legislative provision, either by Act of Parliament, which is the most common, or by way of ministerial orders in the form of delegated legislation.[92]

Incorporation, even by these means is not, however, always clear. For example, the courts have ruled by reference to the legislative history of a statute that Parliament has incorporated a treaty, even where the relevant statute makes no reference to the treaty itself.[93] Moreover, in certain cases the courts have ruled that an entire treaty has been incorporated even when the statute which incorporated it made reference only to certain parts of that treaty.[94] But, as Neff notes, "the most usual practice is for the statute to state that it gives effect to the treaty, the full text of which is scheduled to the Act."[95] Once a treaty has been incorporated into domesic law it has the same status as any other Act of Parliament, rather than enjoying any special status by virtue of its origins in international law.

Whilst this is the strict legal position, the reality is, as Higgins notes, "not so simple."[96] There are cases where blurred lines exist. For example, in relation to the UK's former membership of the EU. As discussed above, the European Communities Act 1972 gave rise to debate on whether the Act had undermined the sovereignty of Parliament. However, it also presents something of a challenge to the UK's dualist approach to international law. This is so in situations where the EU has concluded a treaty with an outside party, as these treaties are, by virtue of EU law, to be directly enforceable in EU member states.[97] But Crawford notes that although treaties concluded by the EU might appear to be exceptions

[92] Stephen C Neff, 'United Kingdom' in Dinah Shelton (ed), *International Law and Domestic Legal Systems* (Oxford University Press 2011) 622.
[93] *See In Re Westinghouse* [1978] AC 547. There, as Neff notes, "the House of Lords' opinions revealed that all of them were aware that the Evidence (Proceedings in other Jurisdictions) Act 1975 was adopted to give effect to the Hague Convention on the Taking of Evidence abroad in Civil or Commercial Matters 1970, but the 1975 Act failed to refer to the treaty." ibid 622, fn 9.
[94] For example, in *Wilson Smithett and Co Ltd v Terruzzi* [1976] 1 QB 683, 711, where again Neff notes that "Lord Denning is said to have assumed that the entire Articles of Agreement of the International Monetary Fund had been incorporated, although the legislation only referred to certain provisions." ibid 622, fn 10. See also FA Mann, *Foreign Affairs in English Courts* (Clarendon 1986) 97–99.
[95] Neff (n 92) 622. In saying this, Neff highlights that the form of incorporation most usual to the UK is transformation, see above section 5.2.1.
[96] Higgins (n 79) 125.
[97] See, e.g., both *Bresciani Case* [1976] ECR 129; and *Kupferberg Case* [1982] ECR 3641, cited in Neff (n 92) 622, fn 8.

to the usual rules on how treaties must be given effect in domestic law, as they take effect without the need for incorporation, this is merely because of the way in which the 1972 Act was constructed.[98]

For completeness, it is important to examine the role that the courts of England and Wales play in the interpretation of statutes where they interact with treaties.[99] Where statutory text is unclear it is sometimes possible to use treaties to assist in the interpretation of the unclear wording. This is because, as Lord Justice Diplock noted in *Salomon*, "there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specified treaty obligations".[100] More recently, Lord Hoffman, said that "there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation."[101] Although, the House of Lords has previously clarified that this principle is a "canon of construction" and involves "no importation of international law into the domestic field".[102] This canon of construction has been elevated to an obligation of construction in respect of the ECHR rights. Section 3 of the Human Rights Act requires judges "So far as it is possible to do so" to read and give effect to "primary legislation and subordinate legislation… in a way which is compatible with the Convention rights."[103] This is, however, an isolated exception to the general rule outlined above.

In interpreting Acts of Parliament which incorporate treaties, Crawford highlights that "it is to be remembered that the primary object of interpretation is the implementing statute, and only at one remove the treaty" which it incorporates.[104] Importantly, although the rulings of international courts and tribunals cannot bind the courts of England and Wales, the courts will readily make reference to these international decisions when making a decision on interpretation of treaty wording

[98] Crawford (n 14) 64.
[99] This is discussed in depth in relation to the ECHR in chapter 7.
[100] *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143.
[101] *R v Lyons and* Others [2002] UKHL 44, [27], per Lord Hoffmann.
[102] In *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 748.
[103] This is discussed in more depth in chapter 8.
[104] Crawford (n 14) 65.

in domestic law.[105] However, in a situation where a domestic statute is at odds with a treaty obligation and the statute is unambiguous, it is necessary always to apply the domestic law rather than defer to the treaty.[106] This, once again, highlights the respect for the doctrine of parliamentary sovereignty at the heart of the UK's constitution and serves to underline the fact that Parliament is free to legislate domestically in defiance of its international obligations.

With respect to the courts in England and Wales, Lord Mance has commented that "Dualism does not… mean that international law issues never come before domestic courts. Increasingly over the last two or so decades, they have done so… even apart from the ECHR, there has been a striking increase in reliance on and the potential relevance of international law in domestic courts."[107] As this section of the chapter has demonstrated, the UK's dualist approach to international law owes much to the UK's unique constitutional structure. It has clearly shown that, in all cases, for treaty law to become part of the law of the UK, and thus the law of England and Wales, incorporation, of one form or another, must occur.

5.5 Conclusion

This chapter has examined the broad approaches of monism and dualism in their general sense. Although these labels operate as shorthand notes on how individual legal systems function, they are of use in providing a generalised classification of states' legal systems. Of greater relevance to answering the research question at the core of this thesis is the UK's approach to international law. To that end, this chapter has first, outlined the key parts of the UK's constitutional structure and second, tied those in with an examination of how UK law treats international law. It has particularly highlighted that incorporation is

[105] ibid. Although, again, this general rule is formalised in respect of the ECtHR: s 2 of the Human Rights Act requires that courts "determining a question which has arisen in connection with a Convention right must take into account any… judgment, decision, declaration or advisory opinion of the European Court of Human Rights".
[106] See, e.g., *Collco Dealings Ltd v Inland Revenue Commissioners* [1962] AC 1.
[107] Lord Mance, 'International Law in the UK Supreme Court' (Kings College, London, 12 February 2017) para 7.

necessary for international law to have effect in the UK, and thus in England and Wales.

This chapter is important as the doctrinal analysis contained within it will lead on to the subsequent three chapters. These chapters synthesise doctrinal analysis of human rights law with quantitative measurement of how changes to the law have affected the courts' ability to protect human rights in England and Wales. An understanding of incorporation is vital for this work as these chapters will examine the effect of incorporation of the ECHR and compare this with the, unincorporated, ICCPR.

6. Human Rights in the UK Pre-ECHR and -ICCPR

6.1 Introduction

This chapter examines the history of human rights in the England and Wales prior to the UK's becoming a party to either the ECHR or the ICCPR. This is relevant to the question underlying this thesis (*viz* has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales?) as it provides a basis against which to measure the impact of the UK's becoming a party to the ECHR and ICCPR and, therefore, to demonstrate the impact which these instruments have had on the human rights framework in England and Wales.

The chapter starts by providing an overview of the approach to the protection of human rights which predominated in England and Wales. This will contextualise the jurisdiction's development in this sphere. It will show that the traditional understanding of rights can be better described as liberties, and that there is a long, and at times ground-breaking, history of liberties in England and Wales. *Inter alia*, this section examines the leading case law in this area, cases such as *Entick v Carrington*,[1] which provides insight into how the liberties enjoyed by those in England and Wales worked in practice. This section allows for a comparison, further on in the thesis, with the approach taken to "positive" rights and allows for an exposition of the impact of international human rights instruments, in this case the ICCPR and ECHR, on the rights landscape.

Next, the chapter examines three seminal statutes and charters which arguably support an understanding of rights and liberties in England and Wales prior to 1953: Magna Carta 1215, the Petition of Right 1627, and the Bill of Rights 1689.[2] An understanding of these is vital as they demonstrate the way in which liberties developed as the power of the Crown was modified to the benefit of some of

[1] (1765) 95 ER 807.

[2] Some sources give 1688 as the year of the Bill of Rights due to the way in which acts of Parliament used to take effect (prior to 1793 all acts of Parliament were ex-post facto laws backdated to the start of the Parliamentary session). However, the Bill of Rights was passed in 1689 and that is the designation used here.

those resident in England and Wales.[3] Finally the chapter turns to the approach towards human rights in the aftermath of the Second World War and prior to 1953. It shows that the approach to human rights in England and Wales in the aftermath of the Second World War remained static, and, despite the UK's involvement in the development of human rights at the international level during this time, little progress was made in the domestic sphere prior to 1953.

In the wider context of this thesis, this chapter is the first of three substantive chapters which seek to show the place of human rights and liberties in England and Wales over three periods of time: before the UK's becoming a party to the ECHR, prior to the incorporation of the latter and, finally, since incorporation. This chapter uses doctrinal research to provide a point of reference against which to assess the developments in the latter two periods of the UK's human rights history: without it, it would be impossible to assess whether the UK's becoming a party to the ECHR had a demonstrable effect on the UK legal order. This analysis will be compared and contrasted with an examination of the courts' use of the ICCPR during the same periods.

At the outset, however, it is worth noting that that a discussion of the development of human rights is made significantly more difficult by the fact that the term "human rights" is a comparatively recent development.[4] Indeed, as Tugendhat asserts, "the term 'human rights' was first used in the late eighteenth century. Both before and after the introduction of that term, other terms were used to refer to the same rights."[5] Whilst this is the case, however, this thesis will, wherever possible, use the language of human rights to ensure clarity. Although this is so, there remain important distinctions between the different turns of phrase used to articulate the concepts of rights and liberties; it is important to understand how these differ. Fenwick succinctly explains the difference saying that "The word 'right' can denote a primary rule *requiring a respondent to act* to secure a right (a

[3] As will be demonstrated in this chapter, these instruments provided limited rights to a very small group of people, rather than being a means of providing rights to the public at large.
[4] Thomas Paine is often credited with the first use of this phrase, see, e.g., Robert Lamb, *Thomas Paine and the Idea of Human Rights* (Cambridge University Press 2015). The development of human rights is also discussed in chapter 4.
[5] Michael Tugendhat, *Liberty Intact* (Oxford University Press 2016) 15.

claim-right) or merely the absence of a duty upon the subject to act or refrain from acting (a liberty)."[6] Another important point in the terminology related to rights and liberties in England and Wales should be raised, and that is the meaning of the term civil liberties. Again, Fenwick provides a succinct explanation of this terminology, noting that these "Liberties are termed 'civil'… because they refer to freedoms of citizens within the civic state."[7]

6.2 Human Rights, Freedoms and Liberties in England and Wales

Prior to examining the state of human rights in England and Wales at the point of the UK's becoming party to the ECHR in 1953, it is helpful to examine the historic development of human rights in England and Wales. The idea that humans have rights which are innate and inalienable is not a new concept, and the UK's role in the development of human rights internationally has been important. Indeed, some commentators suggest that the UK was one of the birth places of human rights. Sieghart argues that it "has a good claim to be considered the cradle of human rights… From at least Magna Carta in 1215 [it] has contrived to excuse principles of 'civil rights' and 'civil liberties' from the interstices of a succession of internal political or economic power struggles."[8]

Dworkin portrays the England and Wales of the previous millennium as "a fortress for freedom… Its legal tradition… irradiated with liberal ideas".[9] He goes on to provide examples: "that people accused of a crime are presumed innocent, that no one owns another's conscience, that a man's home is his castle, that speech is the first liberty because it is central to all the rest."[10] But whilst England and Wales was a fortress for freedom, this was a nebulous concept and one which

[6] Helen Fenwick, *Fenwick on Civil Liberties and Human Rights* (5th edn, Routledge 2017) 13.
[7] ibid. Although Fenwick also notes that the term "civil" can be used in contrast to those rights classed as economic, social and cultural rights, discussed in previous chapters, this is a separate distinction which is of less importance in regard to the development of rights in England and Wales prior to the post-World War Two era of international human rights expansion.
[8] Paul Sieghart, 'Foreward' in Paul Sieghart (ed), *Human Rights in the United Kingdom* (Pinter Publishers 1988) 2–3. It is perhaps from sentiments such as this that the sense of UK exceptionalism in relation to human rights stems. Magna Carta has also been criticised for protecting the rights of a small group of people, see section 6.3 of this chapter.
[9] Ronald Dworkin, 'Does Britain Need a Bill of Rights?' in Richard Gordon and Richard Wilmot-Smith (eds), *Human Rights in the United Kingdom* (Oxford University Press 1996) 59.
[10] ibid.

did not allow a wronged party easily to secure their rights and liberties against infringement. As Feldman notes, “the general approach to protecting rights in the UK was to think in terms, not of liberties or freedoms, but liberty or freedom”, indeed “The dominant idea has been that of an undifferentiated mass of liberty.”[11] Against this backdrop, Dworkin asserts that protection for liberties lagged behind most other nations by the turn of the millennium.[12]

One reason for the lack of rights protection in England and Wales in the years before 1953 is the unusual arrangement of the UK’s constitutional structure, which, as discussed in chapter 5, does not allow for the entrenched protection of human rights. Another reason is the predisposition against rights protection amongst legal scholars in England and Wales was the prevailing attitude until well into the twentieth century. Both these factors will be examined in turn. The UK’s constitutional framework has already been discussed earlier in this thesis, highlighting the pre-eminence of the doctrine of parliamentary sovereignty.[13] As Lester notes:

> The cornerstone of [the constitutional] system is the absolute and unfettered sovereignty of the national legislature. Parliament has the right to make or unmake any law whatsoever, and no person or body has the right to override or set aside the legislation of Parliament. We make no distinction between laws that are not fundamental or constitutional and laws that are fundamental or constitutional, and there is no supreme law against which to test the validity of other laws.[14]

Whilst this may oversimplify the complexities of the checks and balances which govern the UK’s constitution, it concisely summarises the difficulty in protecting human rights in this setting: it is constitutionally impossible to entrench them.

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[11] David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press 2002) 70.
[12] Dworkin (n 9) 59.
[13] See chapter 5.
[14] Anthony Lester, ‘Fundamental Rights in the United Kingdom: The Law and the British Constitution’ (1976) 125 University of Pennsylvania Law Review 337, 338.

In addition to the difficulties posed for human rights protection by the UK constitution, there was also a reticence amongst legal scholars in the UK generally, and in England and Wales in particular, to see the benefit of rights as they emerged in other legal orders. This ensured that they were unlikely to be lent the same credence in England and Wales as elsewhere. Thus, of the French Declaration of the Rights of Man, Jeremy Bentham said "Look to the letter, you find nonsense – look beyond the letter you find nothing… Natural rights is simple nonsense: natural and imprescriptible rights… nonsense upon stilts."[15]

Dicey, whose 1885 work *Introduction to the Study of the Law of the Constitution* is still central to an understanding of the UK's constitution, wrote, somewhat paternalistically, that "Now, most foreign constitution-makers have begun with declarations of rights. For this they have often been in nowise to blame."[16] At the Government level, the antagonism to the articulation of enforceable human rights was summed up in a Colonial Office note to the UN saying that "The British conception of human rights and fundamental freedoms is based on a general acceptance of the principle of liberty, an acceptance which is so fundamental that the existence of these rights is taken for granted."[17] This attitude did not rapidly alter in the twentieth century either. Writing in 1961 De Smith pointed out that "until a few years ago Anglo-Saxon attitudes towards declarations of fundamental rights were almost uniformly unfavourable."[18]

The positive protection of individual rights was clearly anathema in England and Wales prior to the middle of the twentieth century.[19] Instead, the individual enjoyed liberties rather than rights. The nature of liberties is well summarised in Halsbury, which notes that "[b]efore the incorporation of the European Convention on Human Rights United Kingdom citizens enjoyed 'liberties', not

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[15] Quoted in SA De Smith, 'Fundamental Rights in the New Commonwealth' (1961) 10 International & Comparative Law Quarterly 83, 84 fn 7.
[16] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th revised edn, first published 1885, Liberty Fund Incorporated 1982) 117.
[17] Colonial Office document CO 936/179 quoted in AW Brian Simpson, *Human Rights and the End of Empire* (Oxford University Press 2001) 16. It is interesting to note that the comment came just a year prior to the entry into force of the European Convention on Human Rights, in 1953.
[18] De Smith (n 15) 83.
[19] Although rights as we would understand them now had yet to emerge fully, documents such as the United States Constitution provided for rights which could be enforced by the individual against the state.

rights: a person did no wrong to exercise them, but there was no positive formal duty imposed on any organ of the state to allow or facilitate them."[20] More importantly, this undifferentiated mass of liberties, as Feldman put it, did not make it easy for the citizen to understand their freedoms. Barnett observes that as a result of the residual nature of liberties (in that they existed only residually in the space left by the law), it was not possible to find them clearly enumerated: rather to ascertain what rights and liberties existed "it might be necessary to research hundreds of years of case law."[21]

This is not to say, however, that the freedoms of the individual were never protected by the courts. A leading case in the area of liberties is that of *Entick v Carrington*.[22] The home of Entick had been broken into by Carrington and others, acting on a warrant issued by the Secretary of State for the Northern Department. They were searching for evidence that Entick was "the author, or one concerned in the writing of several weekly very seditious papers… containing gross and scandalous reflections and invectives upon His Majesty's Government, and upon both Houses of Parliament".[23] During the course of the search, Carrington and his men did significant damage to Entick's property. Entick sued for trespass.

The Court of the King's Bench held that the Secretary of State had no legal authority, either in statute or at common law, for the issue of the warrant, and thereby found in favour of Entick. [24] It held that:

> …if this is law it would be found in our books, but no such law ever existed in this country; our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.[25]

[20] *Halsbury's Laws* (5th edn, 2018) vol 88A, para 11.
[21] Hilaire Barnett, *Constitutional and Administrative Law* (3rd edn, Cavendish 2000) 119.
[22] *Entick v Carrington* (n 1).
[23] ibid 275-276.
[24] The Court of the King's Bench was a common law court which was merged into the High Court by way of the Supreme Court of Judicature Act 1873.
[25] *Entick v Carrington* (n 1) 291.

Allan, writing about the role of the common law in protecting human rights, noted that the principle derived from *Entick v Carrington* demonstrates that there must be lawful authority for every action by the state which encroaches on the liberty of the individual.[26] Moreover, that "every encroachment by the state (or by another) on one's freedom must be justified… [although] There need not be special moral justification of the kind which permits restriction of a basic liberty, such as freedom of speech."[27] Therefore, "The burden is on the government or public authority to justify coercion… every coercive act of government which is not shown to be authorized is automatically illegal."[28]

This illegality is also linked with the concept of the rule of law.[29] Dicey argued that the principle of the rule of law, and by extension the need for authorisation when interfering with liberties, bound every person, irrespective of their position within the state or society. He argued that:

> With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority.[30]

The approach towards liberties in England and Wales was viewed as a more than adequate method of protection for the individual. As Jennings argued: "In Britain we have no Bill of Rights; we merely have liberty according to the law; and we think – truly I believe – that we do a better job than any country which has a Bill of Rights or a Declaration of the Rights of Man."[31] Moreover, this approach had a long history. Simpson asserts that the fact "that British arrangements especially

[26] TRS Allan, 'Constitutional Rights and Common Law' (1991) 11 Oxford Journal of Legal Studies 453, 457.
[27] ibid.
[28] ibid.
[29] It is also worth noting that this largely echoed the view of Blackstone who had "firmly established the idea that civil liberty and the rule of law were inexorably connected." See Simpson (n 17) 24–26.
[30] Dicey (n 16) 114.
[31] WI Jennings, *The Approach to Self-Government* (Cambridge University Press 1956) 99.

favoured liberty… had been firmly established in the seventeenth century" but notes that it "can be traced back further" than this.[32]

Not only were these protections deemed to be adequate, however, it was also believed that there was also nothing to fear from the sovereignty of Parliament. Indeed, the view was that "The sovereignty of a Parliament of the English type was not a threat to liberty but the very means by which it was preserved."[33] As Blackstone explained "the true excellence of English government, [is] that all parts of it form a mutual check upon each other" ensuring that liberty is always protected.[34] But, for all the belief in the supremacy of this approach, "there could at the end of the day be no *legal* guarantee of liberty, no ultimate legal remedy".[35]

This approach, focusing on those liberties which existed as long as the law did not encroach, was, then, clearly the logical conclusion of the way in which the constitution functioned. This was backed up by a belief that this type of constitution, allied with this kind of protection of liberty, was not only sufficient to protect the individual (as it had done in *Entick v Carrington*), but that it was also the envy of the world.[36] However, there were some exceptions to the rule that the protection of individual rights and liberties was the exclusive competence of those areas untouched by the law. There were a number of statutes and charters which impacted on this area. It is to these that this chapter now turns.

6.3 "Rights" Legislation in England and Wales

There are three statutes and charters which are widely regarded to be part of the development of individual rights in England and Wales. Although different commentators sometimes increase or reduce this list, the three which are almost exclusively examined are Magna Carta of 1215, the Petition of Right 1627, and the Bill of Rights 1689. This section will examine these in turn. At the outset,

[32] Simpson (n 17) 23.
[33] ibid 28.
[34] Blackstone's *Commentaries* quoted in ibid.
[35] Simpson (n 17) 28.
[36] As will be seen below, this was a view which still held currency even after the emergence of the international human rights movement in the first half of the twentieth century.

however, it is useful perhaps to note that these instruments are not "rights instruments" in the sense that we would now understand. Rather, they are more akin to basic constitutional documents which governed the relationship largely between Parliament and the Crown. Where they did enumerate rights, these were often granted only to a select few wealthy, powerful individuals (particularly so in the case of Magna Carta). They had little, if any, impact on the day to day lives of the vast majority of those living in England and Wales. Irrespective of this, however, an understanding of the developments which led to the system in place prior to the UK's becoming a party to the ECHR in 1953 is helpful in providing a background to the changes the ECHR brought about in England and Wales.

6.3.1 Magna Carta

Magna Carta is often viewed as the starting point of legal protection of individual rights. The former President of the UK Supreme Court referred to it as "probably the most famous and celebrated legal document in the world."[37] Indeed, he continued, though it is "of little practical importance today, [it] retains a potent symbolic power in its early recognition of the basic liberties… and the state's obligation to protect them."[38] Although it is viewed reverentially by many commentators, particularly those from the United States, Magna Carta "while influential as a very early statement of rights, it is not comparable to a modern Bill of Rights in terms of extent or impact on current law."[39]

As Tugendhadt explains, "The legal rights which the king conceded to the barons embodied the natural rights by which the barons justified their rebellion against the king, whom they called a tyrant."[40] Many of the rights which were granted by Magna Carta were simply a formalisation of rights which were said to exist through custom, and although the moment is often viewed as a unilateral granting

[37] Lord Neuberger, 'Magna Carta: The Bible of the English Constitution or a Disgrace to the English Nation?' (Guildford Cathedral, 18 June 2015) para 1 <https://www.supremecourt.uk/docs/speech-150618.pdf> accessed 18 December 2020. Neuberger provides a very useful summary of the history behind the signing of Magna Carta.
[38] Douglas W Vick, 'The Human Rights Act and the British Constitution' (2002) 39 Texas International Law Journal 329, 337.
[39] Fenwick (n 6) 1.
[40] Tugendhat (n 5) 18.

of rights by King John, it was in reality a more pragmatic action, designed to regain, and thereafter retain, the loyalty of the rebel barons.[41] Indeed, despite the level of importance often attached to Magna Carta the number of people actually protected by it was very small indeed. Rather, it largely "pertained to the interests of the barons, [although] a significant proportion of its clauses dealt with all free men, which included the barons, knights and the free peasantry."[42] That said, however, the symbolic importance of Magna Carta should not be underestimated, as can be seen from the reverential attitude towards it particularly from US constitutional scholars. Hersch Lauterpacht, a seminal figure who was highly influential in the development of international human rights law in the mid-twentieth century, also viewed Magna Carta as a hugely important moment in legal history, writing that:

> …in the history of fundamental rights no event ranks higher… The outstanding feature of that event is the limitation of the power of the supreme authority… The vindication of human liberties did not begin with their complete and triumphant assertion at the very outset. It commenced with recognizing them in some matters, to some extent, for some people, against some organ of the State.[43]

Indeed, what Magna Carta sought to do was to limit, in a very narrow sense, the authority of the Crown by granting free men rights which could be used to curb executive power. It "protects liberty and property, and requires that there be access to justice, in the form of a court".[44] Most famously, it states that:

> No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful

[41] ibid 18–19.
[42] British Library, 'Magna Carta: People and Society' (*Magna Carta*, 28 July 2014) <https://www.bl.uk/magna-carta/articles/magna-carta-people-and-society> accessed 18 December 2020. As this article notes "The distinction between the free and the unfree peasantry ('the villeins') varied across the country. Generally, in contrast to an unfree villein, a free man could leave his manor, could buy or sell land, and owned his goods and possessions." Importantly, villeins "formed most of the population."
[43] Hersch Lauterpacht, *An International Bill of the Rights of Man* (first published 1945, Oxford University Press 2013) 56–57. Quoted in Tugendhat (n 5) 19.
[44] Tugendhat (n 5) 19.

> judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right.[45]

Whilst these are clearly grants of rights to individuals, the purpose was not to create a system whereby rights could be challenged in court; rather, the aim was to create a better division of power. It is from Magna Carta that we see the emergence of the doctrines of the rule of law, and separation of powers, which were to become central to the UK's constitution. Tugendhadt views Magna Carta not as a starting point for bills of enforceable, individual rights but as providing "the starting point for the British tradition of protecting civil liberties, which later developed into the protection of civil and political rights".[46] This link is clear: Magna Carta prevented the king from ruling by executive fiat and paved the way for the need for legal authority for state actions which is seen in *Entick v Carrington*.

Nonetheless, there is no definitive view of the importance of Magna Carta, as Lord Neuberger noted in a speech in the 800th year of Magna Carta:

> Sceptics see it as a dramatic confrontation between a bad King and his over-mighty Barons, which achieved nothing at the time, and then fortuitously captured the national imagination, largely thanks to Edward Coke's propagandist abilities. Enthusiasts contend that it deserves all the praise which has been heaped on it, because, more than any other document or event, Magna Carta contained the fundamental seeds from which a modern civilised society could grow.[47]

Nonetheless, whichever is the preferred view, Magna Carta has a place in articulating the development of the concept of rights and liberties in England and Wales.

[45] Magna Carta 1215, clauses 39–40.
[46] Tugendhat (n 5) 21.
[47] Neuberger (n 37) para 27.

6.3.2 Petition of Right

Chronologically, the next of the three seminal instruments which has a bearing on the development of the understanding of rights in England and Wales is the Petition of Right of 1627. This Petition was a response to the re-emergence of the use of the Royal Prerogative to govern at the expense of Parliament, particularly in relation to declarations of martial law and taxation.[48] Thus, for example, in relation to taxes, the Petition reasserts that citizens "should not be compelled to contribute to any Taxe Tallage Ayde or other like Charge not sett by cōmon consent in Parliament."[49] This clearly asserts the need for lawful authority for the actions of the state. Moreover, the Petition of Right is clearly the inheritor of what came before it. As Capua notes, "The Petition first rehearses the so-called due process chapter of Magna Carta" before making specific claims about contemporaneous use of martial law.[50]

Whilst much more limited in its scope than Magna Carta, and of less symbolic significance, the Petition of Right clearly reasserts the traditional understanding of the rule of law. It has a clear parallel with the impact of Magna Carta in the development of the conception of civil liberties in England and Wales. Dicey wrote of the Petition of Right (and the Bill of Rights, discussed below) that it contains:

> proclamations of general principles which resemble the declarations of rights known to foreign constitutionalists… [but] The Petition of Right and the Bill of Rights are not so much 'declarations of rights' in the foreign sense of the term, as judicial condemnations of claims or practices on the part of the Crown, which are thereby pronounced illegal.[51]

[48] For a detailed discussion about the abuse of martial law at this point in English legal history see JV Capua, 'The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right' (1977) 36 Cambridge Law Journal 152.
[49] Petition of Rights 1627, s 1
[50] Capua (n 48) 171.
[51] Dicey (n 16) 118–119. Dicey uses the American Constitution as one such example of the work of "foreign constitutionalists".

This pronouncement arguably places the Petition of Right very much in the English and Welsh tradition of rule of law, and general, non-defined liberty. It does not provide any concrete, tangible rights to the individual. Rather, it serves as a way of ensuring that the legitimate authority of the state is recognised and that the limits of that authority are highlighted. It does not, however, make the trespass of such limits actionable. This contrasts with the traditions of positive restriction of the state by way of individual rights as found, to use the example given by Dicey's pronouncement, in the American Constitution.

6.3.3 Bill of Rights

The Bill of Rights 1689 is viewed by some commentators as a useful point at which to begin the examination of the protection of rights in England and Wales, rather than Magna Carta.[52] By contrast with those instruments discussed above, it contains something more closely resembling a statement of rights granted to the individual. As Halsbury puts it "The Bill of Rights… contained several provisions relating to human rights, including a requirement that no 'cruell and unusuall punishments' could be inflicted and that the freedom of speech and debates or proceedings in Parliament should not be impeached outside Parliament."[53] However, the Bill of Rights, despite its name, "was primarily concerned with regulating the relationship between Parliament and the Crown, and did not provide for judicially-enforceable individual rights."[54] Although, as has been demonstrated, Dicey argued that it certainly resembled a bill of rights in the more traditional sense.[55]

The Bill of Rights itself suggests that the rights contained within it are neither new nor revolutionary. Rather, it is framed as a declaration "vindicating and asserting… ancient rights and liberties".[56] It then goes on to make thirteen

[52] Charles Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford University Press 2007) 21.
[53] *Halsbury's Laws* (n 20) vol 88A, para 1.
[54] Vick (n 38) 340, fn 79.
[55] Dicey (n 16) 118–119.
[56] Bill of Rights 1689, I.

declarations about the rights and freedoms which ought to be afforded. These are:

> That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal;
>
> That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal;
>
> That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious;
>
> That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;
>
> That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal;
>
> That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law;
>
> That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law;
>
> That election of members of Parliament ought to be free;
>
> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament;
>
> That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;
>
> That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders;

> That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void;
>
> And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliaments ought to be held frequently.[57]

Some of these declarations do have clear parallels with those rights protected by more modern rights instruments. For example, the requirement for free elections and the abolition of cruel and unusual punishment.[58] However, as with Magna Carta, it is important to understand that these protections cannot be viewed as synonymous with modern human rights protections. Indeed, things such as the definition of cruel and unusual punishment and free elections have changed beyond recognition in the intervening centuries. As it is declaratory, "the Bill of Rights does not confer positive rights upon individuals",[59] nonetheless, it serves as an important milestone in the development of the law of England and Wales in this regard.

6.3.4 Other Legislation

These charters and statutes clearly have had an impact on the way in which we understand how rights and freedoms have been protected in the law of England and Wales. But there are many other areas where the law has sought to protect the liberties of the individual. One such example is the Habeas Corpus Act 1640. This was designed to formalise the customary rules around the need for legal examination of a prisoner's detention and to prevent the use of arbitrary and unlawful detention. Indeed, Dicey said that "The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."[60] However, whilst it retains its status as a key point in the development of liberties and rights in England and

[57] ibid.
[58] The right to participate in elections is protected by Article 25 of the ICCPR (within the right to participate in public life and society) and Article 1 of Protocol 1 of the ECHR respectively. Whilst cruel and unusual punishment is prohibited under the Article 7 of the ICCPR and Article 3 of the ECHR, which prohibit torture, inhuman and degrading treatment generally.
[59] Parkinson (n 52) 22.
[60] Dicey (n 16) 118.

Wales, the Act did not always provide an effective remedy, such as in respect of mass internment during both World Wars.[61] Other legislation, for example, was aimed at changing the legal rights afforded to individuals, by way of extending suffrage to non-landed persons, and much later, to women,[62] or by abolishing slavery.[63] But these were specific, and not general, right-based reforms.

Whilst, as has been shown, there been has a long history of the development of legislation designed to protect freedoms and liberties, or to clarify common law rights, in England and Wales, these protections were not always effective. Indeed, in host of situations, the protections offered by the likes of Magna Carta and the Habeas Corpus Act did not provide protection to those who needed it, particularly in the context of executive detention. This is a particularly relevant example in the context of this chapter, as Bingham notes "freedom from executive detention as probably the oldest of recognised human rights in reliance on chapter 39 of Magna Carta 1215".[64] Despite longstanding recognition of this right in England and Wales, however, it has a corresponding, longstanding history of being tampered with, aptly demonstrating the risks of the historic approach to liberties.

The Habeas Corpus Act 1640 was designed to make the exercise of the right to freedom from executive detention easier. However, less than 30 years after the passage of the 1640 Act, complaints were made that officials were attempting to defeat the operation of the Act "by sending persons to 'remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law'" as the law did not extend to such places.[65] Bingham makes clear the scale of the suspension of these protections over the intervening years:

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[61] Discussed below. See generally Tom Bingham, 'Personal Freedom and the Dilemma of Democracies' (2003) 52 International & Comparative Law Quarterly 841.

[62] Much legislation was enacted in this sphere, for example the Reform Act 1832, which extended the vote to those who rented land of a certain value, and the Representation of the People Act 1914 which gave some women and all men over 21 the right to vote. Full equality in suffrage was not achieved until Representation of the People Act 1928.

[63] Slavery was abolished by the Slavery Abolition Act 1833.

[64] Bingham (n 61) 842.

[65] ibid 843. There are modern day comparisons between this practice and the US administration's use of Guantanamo Bay as a detention centre for suspected foreign terrorists to avoid habeas corpus claims. See, e.g., Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 54 International and Comparative Law Quarterly 1.

> The right to apply for habeas corpus was suspended on some fifteen occasions between 1688 and 1848, as (for example) for those accused of treason in 1794 and again in 1817. In Ireland, to which the writ was not extended until 1781, access was suspended in 1866 and 1867, and there followed Acts of 1871 and 1881 which gave the government a power to detain on suspicion and precluded any enquiry or intervention by the courts.[66]

This is but one example which illustrates that, whilst this approach allowed for the law to protect rights and freedoms whilst Parliament wished it to, the same Parliament could, and did, curtail rights whenever it wished. This had the effect of vastly weakening any protection offered. Moreover, as is discussed below this practice continued, and arguably worsened, into the twentieth century.

The law of England and Wales has at various points over the last several hundred years played a key role in the development of "rights" legislation. Indeed, charters and statutes such as Magna Carta have spawned the development of rights movements in countries such as France and the United States. However, these rights instruments, whilst bearing similarities to modern bills of rights and treaties on rights, did not protect many of those living in the England and Wales. Indeed, the Bill of Rights does not confer any positive rights on individuals, and Magna Carta bolstered an already powerful elite rather than granting rights to all. Moreover, particularly in the sphere of executive detention, the protections provided by Magna Carta and the Habeas Corpus Act provided little protection, if any, in many cases. Nonetheless, the image persists, in many quarters, of the UK generally, and England and Wales in particular, as the home of freedom, which led the way in the development of the human rights movement.

6.4 Rights in England and Wales in the Twentieth Century

Whilst it is important to understand the wider history of the development of rights and freedoms in England and Wales, the purpose of this chapter in assisting to

[66] Bingham (n 61) 845.

answer the research question is to demonstrate the change to the domestic law of England and Wales brought about by the UK becoming a party to the ECHR, and comparing this with the changes brough about by the UK's becoming party to the ICCPR. To that end, this section of the chapter aims to provide a clear snapshot of the status of rights and freedoms in England and Wales in the twentieth century, prior to 1953. Writing of the UK broadly, Lord Slynn said: "though the United Kingdom does not have a modern Bill of Rights like the French Declaration or the American Constitution, its citizens have never felt that they suffer from human rights violations any more than anyone else."[67] He justifies this by saying that:

> English law has developed on the basic presumption that individuals can do what they like as long as it is not contrary to the law. As a result, England has not needed any laws affirming such fundamental rights as freedom of expression: one can speak freely as long as the speech is not defamatory, treasonable, or sacrilegious.[68]

However, as this chapter illustrates, there are many examples of fundamental freedoms not being protected in England and Wales, for example in times of war. As such, Slynn's comments are difficult to interpret as much more than British exceptionalism. As has been shown, the approach adopted in England and Wales developed over many hundreds of years, however its most rapid change took place in the twentieth century.[69] Most of this development, however, took place after the UK's becoming a party to the ECHR in 1953.

Despite the UK's involvement in the development of human rights on the world stage, the status of rights, or rather of freedoms and liberties, at a domestic level remained largely unchanged. Indeed, as late as the 1940s, the courts of England and Wales swere clear that positive rights in the sense envisaged by the ECHR's drafters were not part of the law of the land. In *Liversidge v Anderson* Lord Wright

[67] Gordon Slynn, 'The Development of Human Rights in the United Kingdom' (2004) 28 Fordham International Law Journal 477, 480–481.
[68] ibid 480.
[69] Alongside this development of domestic law, this period also saw the UK's involvement in the development of international human rights, this is discussed in more depth in chapter 4.

said of the law of England and Wales that "there are no guaranteed or absolute rights… The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved."[70] This demonstrates the view that the historic approach to rights and freedoms was still at this juncture viewed as not only adequate but preferable. This approach is also echoed in Lord Atkin's famous dissent in the same case. There he said:

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[71]

Clayton and Tomlinson identify three concerns around the adequacy of this method of protection might have proved inadequate prior to the UK's becoming party to the ECHR. They argue that first, "Parliament could always legislate fundamental rights out of existence", meaning that an existing liberty could disappear immediately.[72] As has been shown, this happened in respect of those protections derived from the Habeas Corpus Act prior to the twentieth century. Second, the judiciary did not always provide protection of liberties and rights. In *Elias v Pasmore*, for example, it was held that "the interests of the state must excuse the seizure of documents which seizure would otherwise be unlawful".[73] This dictum serves to illustrate starkly that the judiciary had significant power to curtail individual liberties and rights, as well as to protect them. Finally, "it was not generally possible for judges to provide common law protection of a human right

[70] *Liversidge v Anderson* [1942] AC 206, 261.
[71] ibid 244. Lord Atkin's dissent in this case is remarkable for its rhetorical power and clear argument.
[72] Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd edn, Oxford University Press 2009) para 1.23. This was also a concern after the UK's becoming a party to the ECHR, as, for example, where the citizenship rights of 200,000 East African Asians were removed by means of the Commonwealth Immigration Act 1968.
[73] *Elias v Pasmore* [1934] 2 KB 164, 173. This shows a departure from the stricter approach adopted in *Entick v Carrington* requiring demonstrable legal authorisation for such an act.

by fashioning a new cause of action" as this was the proper role for legislators rather than judges.[74] This too has clear implications for the judiciary's ability successfully to ensure rights and liberties were adequately protected under this approach. This is not to suggest, however, that the judiciary did not develop approaches to minimise the risk of individual liberties and rights being curtailed unnecessarily by Parliament. Indeed, the courts operated on the principle that any interference with fundamental rights would only be given effect where such interference was expressly intended in the legislation.[75] Although, as *Liversidge v Anderson* had shown, the courts could still be overly deferential to Parliament in their interpretation of the intention of such legislation.

In common with the earlier history of the suspension of Habeas Corpus, there are clear examples of Parliament's willingness to act to limit rights in the twentieth century, too. One of the most serious of these limitations was Regulation 14B made under the Defence of the Realm (Consolidation) Act 1914, in June 1915. It granted the Home Secretary:

> [the] power to intern any person if on the recommendation of a competent naval or military authority or of an advisory committee it appeared to him that for securing the public safety or for the defence of the realm it was expedient to do so in view of the hostile origin or associations of such person.[76]

Importantly, the 1914 Act had not granted the Home Secretary such a power: this power was created by way of the regulation. This fact was the basis of an appeal in *R v Halliday* where it was argued by the applicant that this power was not authorised by Parliament and so *ultra vires*.[77] The courts, however, deferred to the state. Indeed, "This argument was rejected by the Lord Chief Justice and four other judges in the Queen's Bench Divisional Court, by all three members of the

[74] Clayton and Tomlinson (n 72) para 1.23.
[75] As was stated by Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, where he said at 286 that "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words". The judgment does not treat this as a new development, rather it treats this as a well-established doctrine.
[76] Bingham (n 61) 846.
[77] *R v Halliday* [1917] AC 260

Court of Appeal and by four out of five law lords (including, in a rather extreme manifestation of the non-separation of powers, the Lord Chancellor)."[78] The reason for courts' deference to the state was summed up in a later case by Lord Reading, the Lord Chief Justice, who said "It is of course always to be assumed that the executive will act honestly and that its powers will be reasonably exercised."[79]

This worrying trend continued. During the Second World War, the powers granted under a successor regulation, Regulation 18B, were used to arrest and detain many thousands. In all "Between 1939 and 1945 almost 27,000 persons were detained in Britain without charge or trial and 7,000 were deported."[80] As Simpson explains in his detailed work on the subject, the courts did not intervene here to protect liberties. In fact, "the courts did virtually nothing for the detainees, either to secure their liberty, to preserve what rights they did possess under the regulation, to scrutinize the legality of Home Office action, or to provide compensation when matters went wrong."[81]

Despite all this, and the rapid growth in the sphere of human rights happening the world over in the aftermath of the Second World War, England and Wales clung to its historic belief that negative liberties were a more than adequate protection of individual liberties and rights well into the twentieth century. Indeed, the form of protection in operation in England and Wales immediately prior to the entry into force of the ECHR in 1953 would have been easily recognisable to scholars like Dicey who had written on it almost a century earlier.

6.5 Conclusion

This chapter has shown that "The [UK] constitution has traditionally eschewed broadly worded textual pronouncements of fundamental rights, preferring,

[78] Bingham (n 61) 847.
[79] *R v Governor of Wormwood Scrubs Prison* [1920] 2 KB 305, 311.
[80] Steyn (n 65) 4. Amusingly, Steyn notes that one of these detainees was Michael Kerr, who when on to become a Lord Justice of Appeal.
[81] AW Brian Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Clarendon Press 1994) 418.

instead, to rely on the democratic process, the rule of law, and the United Kingdom's complex system of checks and balances to safeguard civil liberties."[82] Despite this, however, there has been a long history of liberty in England and Wales, which permitted citizens the freedom to do anything which was not prohibited by law. It also required that any interference with the individual had to be justified by law, as was the case in *Entick v Carrington*. The approach to liberties fits with the way in which the UK's uncodified constitution developed, and the overarching principle of the constitution most famously elucidated by Dicey: the sovereignty of Parliament.

In addition to liberties, however, England and Wales has witnessed the development of certain rights through charter and statute. Magna Carta, for example, set out the rights of free men[83] to be tried by jury and a legal guarantee of due process before the law. The Petition of Right and Bill of Rights which followed Magna Carta set out a number of limitations on the power of both the Crown and of Parliament to act without the due authority of law, such as in the case of taxation, and to guarantee due process for those accused of crime.[84] The Bill of Rights itself very much presents as a rights document, laying out clearly rights in principle but it does not extend to conferring positive rights upon individuals. Moreover, laws related to habeas corpus were designed to prevent arbitrary detention by ensuring that detention could be challenged before a court.[85]

By the end of the 1940s, however, the UK was engaging with the development of the international human rights movement worldwide, seeking to ensure that the atrocities witnessed in the Second World War would never again be seen. However, despite this engagement on the world stage the domestic attitude towards positive rights remained ambivalent. There remained a view that a

[82] Vick (n 38) 330.
[83] A very small group of people relative to the population of the day.
[84] Albeit, this due process offered, by modern standards, scant protection.
[85] These protections did not however always provide any such security. For discussion of how the law of habeas corpus has developed in the United States, where much of the historic legal basis for the protection of rights is drawn from the early English tradition, see Steyn (n 65). Indeed Steyn goes so far as to say of the application of the law of habeas corpus in England and Wales that "Until 11 September [2001] the understanding of the law of habeas corpus would have been the same in the United States", 12.

statement of positive rights was not necessary within the "fortress for freedom".[86] As was noted above, the view that the historic approach was best was captured fully by Jennings. He said that whilst Britain did not have a Bill of Rights it did "have liberty according to the law; and we think… that we do a *better job than any country which has a Bill of Rights* or a Declaration of the Rights of Man."[87] Indeed, even as the UK assisted in the drafting of the ECHR and ICCPR on the world stage this sense of exceptionalism continued. The UK remained certain that its own approach remained not only perfectly adequate, but the best possible way of doing things.[88]

For all this, however, the English and Welsh approach to the protection of rights and liberties left open the possibility of interference by Parliament and the executive. As has been shown, particularly in relation to executive detention, there are countless examples of rights and freedoms being encroached upon, watered down, or totally removed. Despite numerous commentators, including Dicey and Jennings, arguing that this approach was not only adequate but preferrable, it is clear that it had significant shortcomings. Moreover, the courts' willingness to defer to the organs of state in cases where rights or freedoms had been infringed suggests that, despite the nominal protections offered by England and Wales' system of protection of rights and liberties, these could only be enjoyed when Parliament wished them to be. This rendered the system, at best, highly precarious and, at worst totally ineffective.

Thus, prior to 1953 the concept of positive rights, which could be enforced by individuals against the state in the courts of England and Wales had not emerged in domestic law. Rather, negative liberties dominated, with the courts nominally acting as guardians of liberty and ensuring that all state interference with liberty was legally authorised. This is not to say, however, that England and Wales was a place devoid of any rights and freedoms whatsoever prior to its becoming party to the ECHR in 1953. Indeed, there are examples of the courts assisting the

[86] Dworkin (n 9) 59.
[87] Jennings (n 31) 99. Emphasis added. Although this captures the mood in respect of human rights in the England and Wales, it is interesting to note that this work was published as late as 1956.
[88] For further discussion of this see chapter 4 and Simpson (n 17).

individual in securing freedoms insofar as possible, as in *Entick v Carrington*. Nonetheless, the dominant approach can be regarded as antiquated and precarious, and characterised by a significant degree of exceptionalism with regard to human rights. The failure to take steps to protect human rights at home is particularly surprising when contrasted with the steps the UK was taking on the world stage to support the development of systems of positive rights which could be enforced against the state in the aftermath of the Second World War to protect human rights, such as the ECHR and, to a lesser extent, the ICCPR.

This snapshot of the way in which rights and liberties were treated in the UK prior to the UK's becoming a party to the ECHR in 1953 allows the next chapter to show clearly how much change was brought about by the UK's membership of the ECHR, and later examining the impact of the ICCPR by way of comparison. This chapter, in assessing the state of human rights protection in the UK prior to 1953, has provided a foundation against which to assess the changes brought about, first, by the UK's becoming a party to these treaties, and, after that, the impact of incorporation of the ECHR.

7. Human Rights in England and Wales Post-ECHR

7.1 Introduction

This chapter examines the human rights landscape in England and Wales between 1953 and 1998. This era saw the ECHR (and later the ICCPR) enter into force, with the UK as a party to both. However, during this range of time neither instrument was incorporated into domestic law. This period was marked by the development of the domestic use of international law in the context of human rights. As Hunt noted in 1997, surveying the previous decades: "As the number of human rights instruments has steadily increased, and the jurisprudence interpreting the older instruments has become more established, so the frequency of judicial reference to such instruments in domestic cases has increased."[1]

The examination of this period will show how international human rights law was used in the courts of England and Wales prior to incorporation of the ECHR. This allows for a comparison of how incorporation has altered the use of the ECHR in the courts, and for further comparison with the ICCPR. Thus, it is vital in answering the thesis question, *viz* has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales? The chapter will examine the use of the ECHR prior to incorporation, particularly the increasing use of the ECHR in the courts of England and Wales in the 1980s and 1990s. This will then be compared with the use of the ICCPR in the same period. It will demonstrate that, although reference was made to the ECHR in judgments prior to the entry into force of the Human Rights Act, its application was neither uniform nor guaranteed. It will also show that the use of the ECHR in judgments became more widespread over time. It also examines the impact of the UK's ratification of the ICCPR in 1976 on the courts, particularly the use of the ICCPR in judicial decision-making in England and Wales. It will include a comparative analysis of the use of both the ECHR and ICCPR within the courts of England and Wales. Both the doctrinal and quantitative analyses

[1] Murray Hunt, *Using Human Rights in English Courts* (Hart 1997) 127.

are necessary as they allow for a comparison of the use of the ECHR before and after incorporation, and then comparing and contrasting this with the use of the ICCPR since ratification. Finally, this chapter provides an overview of the debate on whether the UK needed a bill of rights in order to secure human rights protection in domestic law; a debate which led to the Human Rights Act, incorporating the ECHR into UK law, and thus into the law of England and Wales.

In common with the preceding chapter, this chapter aims to provide a snapshot. In this case, of the effect of the ECHR on the human rights landscape in England and Wales prior to the Human Right Act. It also aims to provide a comparative snapshot of the effect of the ICCPR in the same context. In doing so, this chapter is key to understanding the impact on the protection of human rights in England and Wales of the Human Rights Act itself.

7.2 The ECHR in the Courts of England and Wales

The ECHR was not quickly incorporated into domestic law. Indeed, for a period of 45 years between 1953 and 1998 the ECHR was not a part of domestic law. Yet, the ECHR still exerted a clear influence on the development of domestic jurisprudence on human rights in England and Wales. Despite this influence, some commentators highlight that the proportion of cases in which the ECHR was mentioned and applied was, in fact, quite low.[2] Clayton and Tomlinson suggest that, although the ECHR began to have an effect on domestic cases as early as the 1970s, it was not until later on, in the 1980s and 1990s, that it began to gain traction in judicial decision-making in a meaningful way.[3] Even then, despite the fact that there had been, according to one study, 473 references to the ECHR in judgments up to 1996:

> …the practical impact of the Convention on domestic case law during this period was not great. In a study carried out by the Democratic Audit of all cases on a database between 1972 and 1993, it was found that the

[2] For example in the analysis in Francesca Klug and Keir Starmer, 'Incorporation Through the Back Door?' [1997] Public Law 223.
[3] Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd edn, Oxford University Press 2009) para 2.40.

> Convention has only been mentioned in 0.2% of them. The Audit concluded that the Convention influence the reasoning of the court in only 24 cases and affected the outcomes in only three.[4]

By contrast, other commentators argue that, although the impact was not immense, it was greater than the study carried out by the Democratic Audit suggested. Speaking with hindsight, after incorporation, Lord Bingham asserted that:

> …the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law.[5]

The following section examines the case law, highlighting the impact of the courts' use of the ECHR on domestic law and noting how this developed throughout the years leading up to the Human Rights Act. Interestingly, it has been argued that "for the first 20 years after its ratification, the Convention had no impact on the domestic courts at all".[6] Given that it certainly appears true that from 1973 the ECHR gained significant traction in the courts of England and Wales, this section focuses on the years after 1973. The section examines in turn the three categories where the ECHR had a significant influence, as outlined by Lord Bingham. These are: the interpretation of statutory provisions, the exercise of discretions, and the development of the common law in respect of rights.[7] The

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[4] ibid. Citing Hunt (n 1); Francesca Klug, Keir Starmer and Stuart Weir, *The Three Pillars of Liberty* (Routledge 1996); Klug and Starmer (n 2).
[5] *R v Lyons* [2003] 1 AC 976 para 13.
[6] Klug and Starmer (n 4) 223. Whilst this might overstate the situation somewhat, it is certainly the case that an analysis of the number of references to the ECHR in the courts during this era shows a clear growth in references towards the end of this period.
[7] *R v Lyons* (n 5) para 13. Whilst "These categories are acknowledged to overlap and to conceal significant sub-categories", as Hunt acknowledges, they are still the most widely used and bring "a semblance of order to what might be otherwise appear to be a bewildering variety of cases from disparate contexts" Hunt (n 1) 128–129. Although Hunt rejects the use of these labels for his own work, he recognises why they are used so widely. There is also a range of writing on the impact of the ECHR system on UK law by way of European Community law, this is not discussed here because, as a result of the European Communities Act 1972, European law automatically became part of UK law and thus this development of the law does not rely on judicial discretion to refer to international human rights treaties. For discussion of this issue see, e.g., A Drzemczewski, 'The Domestic Application of the European Human Rights Convention as

section is not intended to be an exhaustive summary of these developments, rather it serves as an overview of some of the key changes.[8] It shows that the ECHR did bring about a development of the law on human rights in England and Wales during this period.

7.2.1 The ECHR and the Interpretation of Statutory Provisions

The use of unincorporated treaties as a means of interpreting statutes is a widely accepted aspect of the law of England and Wales. Lord Justice Diplock summarised the position in *Salomon* when he said that:

> …there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specified treaty obligations; and if one of the meanings that can reasonably be attributed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is so consonant is to be preferred.[9]

Whilst this clearly creates situations in which unincorporated treaties can have a significant impact on the development of domestic case law, the House of Lords made clear, in *R v Secretary of State for the Home Department, ex p Brind*, that this principle is "a mere canon of construction which involves no importation of international law into the domestic field".[10] Nonetheless, this principle allowed judges in England and Wales to use the ECHR as part of their reasoning process prior to incorporation. Thus, for example, the House of Lords in 1974, in

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European Community Law' (1981) 30 International & Comparative Law Quarterly 118; Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 12 Legal Studies 227; Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] Public Law 397; Hunt (n 1).

[8] For a more detailed discussion of the case law see Hunt (n 1) particularly chapters 4 and 5. Regarding the earlier phase of development see PJ Duffy, 'English Law and the European Convention on Human Rights' (1980) 29 International & Comparative Law Quarterly 585.

[9] *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143. Whilst this case is now some 50 years old, the position remains the same, see, e.g., Clayton and Tomlinson (n 3) para 2.09.

[10] [1991] 1 AC 696, 748.

Waddington v Miah, made reference to the ECHR in respect of the retrospective application of criminal laws.[11]

Whilst it is accepted that unincorporated treaties can be used as a method of statutory interpretation where ambiguity exists, it is a matter of debate whether the need for ambiguity can be relaxed in respect of human rights treaties.[12] Much of this debate derives from the comments of Lord Diplock in *Garland*, where he said that:

> …it is a principle of construction of United Kingdom statutes… that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it.[13]

Whilst commentators such as Hunt have argued that this dictum goes far beyond the traditional requirement for obvious ambiguity,[14] the House of Lords, when presented with Diplock's comments, ruled that:

> While English Courts will strive when they can to interpret statutes as conforming with the obligations of the United Kingdom under the Convention they are nevertheless bound to give effect to statutes which are free from ambiguity in accordance with their terms.[15]

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[11] *Waddington v Miah* [1974] WLR 683, 694. The retrospectivity related to the Immigration Act 1971 and the court held that nobody could be convicted who had committed an offence prior to the Act coming into force on 1 January 1973. Interestingly, the Court also referred to the Universal Declaration of Human Rights to bolster its position.

[12] Clayton and Tomlinson (n 3) para 2.11.

[13] *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771. Although these comments were made in relation to the law of the European Community (now European Union), they are clearly intended to apply more broadly.

[14] Hunt (n 1) 18–21. It is not clear whether Lord Diplock intended his comments to apply to treaties which had been signed but not ratified, but Article 18 of the Vienna Convention on the Law of Treaties says that "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when… it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval until it shall have made its intention clear not to become a party to the treaty". These words have now been clarified in subsequent rulings.

[15] *Re M and H (Minors)* [1990] 1 AC 686, 721, per Lord Brandon.

It appears certain from this ruling that, irrespective of Diplock's earlier comments, the courts required there to be demonstrable ambiguity before they would be willing to resort to unincorporated treaties as a method of interpretation. However, whilst this was the case the precise meaning of ambiguity for these purposes was interpreted broadly to include situations where the provision being examined was "capable of a meaning which either conforms to or conflicts with" the UK's treaty obligations.[16] Whilst this broad definition of ambiguity allowed the courts to use the ECHR in a range of situations, it remained the case that where there was no possible ambiguity, statutes which conflicted with treaty obligations remained both enforceable and immune from human rights-driven interpretation. This was demonstrated clearly in *Taylor*.[17] There the Court of Appeal ruled that "although the dismissal of the applicant for failing to join a union was contrary to his rights under the Convention, it was, by English statute, required to be treated as fair."[18]

An exception to this general rule is to be found in situations in which the statute under examination by the court was intended by Parliament to comply with treaty obligations. In such a situation Clayton and Tomlinson indicate that the courts would adopt a purposive approach to interpretation.[19] Such an approach was adopted by the court in *Ex p Guardian Newspapers* where the Court of Appeal held that:

> It appears to us that we ought to interpret the relevant rules purposively in order, if possible, to comply with the clear intention of Parliament that our national law and procedures should be altered in order to bring them in line with the [ECHR]. [20]

As this demonstrates, the courts were increasingly willing to use the ECHR as an interpretive tool, leading to more human rights focused judgments, even before

[16] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 747-748, per Lord Bridge.
[17] *Taylor v Co-operative Retail Services Ltd* [1982] ICR 600.
[18] Clayton and Tomlinson (n 3) para 2.12.
[19] ibid 2.14.
[20] *Ex p Guardian Newspapers Ltd* [1999] 1 WLR 2130, [17], per Brooke LJ. Although this judgment was delivered after the passage of the Human Rights Act, it was handed down before the Act entered fully into force and relates to an incident prior to the Act receiving Royal Assent.

the ECHR had been incorporated. However, writing shortly before the Human Rights Act, Blake indicated that, whilst the courts' power to use the ECHR as an interpretive tool was undoubted, "The… courts are… slow to find ambiguity in legislation. How the judges decide whether a statute is ambiguous is itself an area of debate."[21] Nonetheless, where the courts did find ambiguity, this canon of construction allowed the courts to use the ECHR to develop the law in a human rights compliant fashion in England and Wales.

7.2.2 The ECHR and the Exercise of Discretion

A second area where the ECHR had a clear impact on the operation of the law prior to the Human Rights Act was in respect of the exercise of discretion.[22] This area of law began to develop in relation to administrative discretion in the 1970s, where there was a string of cases where the argument was made that public officials acting with discretion ought to have regard to the ECHR. Although initially successful, in cases such as *R v Secretary of State for the Home Department, ex p Bhajan Singh*,[23] the Court of Appeal, as Clayton and Tomlinson put it, "decisively rejected" this approach.[24] In *R v Chief Immigration Officer, Heathrow Airport, ex p Salamat Bibi*,[25] Lord Denning's judgment indicates that he believed such an approach placed too great a burden on the public official, saying:

> I think that would be asking too much of the immigration officers. They cannot be expected to know or to apply the Convention. They must go simply by the immigration rules laid down by the Secretary of State, and not by the Convention.[26]

[21] Nicholas Blake, 'Judicial Review of Discretion in Human Rights Cases' [1997] European Human Rights Law Review 391, 392.
[22] For a very full discussion of the development in this area see Hunt (n 1) ch 4. Hunt acknowledges that there was initially significant unwillingness to allow the EHCR to influence this area but that this position slowly shifted towards the end of this period.
[23] [1976] QB 198.
[24] Clayton and Tomlinson (n 3) para 2.23.
[25] [1976] 1 WLR 979.
[26] ibid 985. It is interesting to note that it was also Lord Denning who supported the approach initially in the case of *R v Secretary of State for the Home Department, ex p Bhajan Singh* but in *Bibi* he noted that he believed he had been wrong in adopting this approach, at page 984–985.

Later, “This pragmatic argument was… extended to one of principle” and the courts held that there was no obligation incumbent upon the Secretary of State to use the ECHR as part of the decision-making process in such cases.[27]

Nonetheless, this area of law continued to develop. The strictures of *Bibi* were quickly replaced by a less rigorous approach adopted by the House of Lords in *R v Secretary of State for the Home Department, ex p Bugdaycay*.[28] The applicant, an asylum seeker, argued that he had a right to life which would be put at risk if the Secretary of State’s decision to deport him were to be carried out. Giving judgment, Lord Bridge said:

> The Court must, I think, be entitled to subject an administrative decision to a more rigorous examination, to ensure that is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual’s right to life and when an administrative decision under challenge is said to be one which may put the applicant’s life at risk, the basis for the decision must call for the most anxious scrutiny.[29]

Fordham notes that the phrase “Anxious scrutiny is not judicial rhetoric, but an established doctrine with a discernable [sic] shape and direction.”[30] He argued that where human rights are concerned in a judicial review, the burden lies with the respondent to show that the decision in question is appropriate. In support of this assertion he cites *R v Ministry of Defence, ex p Smith*.[31] Here, the Court of Appeal endorsed counsel for the applicants’ suggestion that “The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above”.[32] The court noted that this represented “an accurate

[27] Clayton and Tomlinson (n 3) para 2.23. See also *Fernandes v Secretary of State for the Home Department* [1981] Imm AR 1.
[28] [1987] AC 514.
[29] ibid 531.
[30] Michael Fordham, ‘What Is “Anxious Scrutiny”?’ [1996] Judicial Review 81, para 2.
[31] [1996] QB 517.
[32] ibid 554, per Bingham MR.

distillation of the principles laid down by the House of Lords" in *Bugdaycay*.[33] Whilst *Bugdaycay* was concerned with a breach of the applicant's right to life, and *Smith* related to the right to private life, the courts found the same scrutiny to be warranted in respect of a range of rights, such as the right to private and family life[34] and the right to freedom of speech.[35]

Clayton and Tomlinson, writing with the benefit of several years' application of the doctrine, caution that whilst "anxious scrutiny" was clearly required in cases where an administrative decision regarding human rights was under examination by a court, it was not "applied consistently and its practical effect was open to question."[36] This caution seems well-founded given the example of *Smith* where on appeal to the ECtHR, despite the Court of Appeal's endorsement of the approach, the ECtHR found that there had been a breach of the claimants' ECHR rights.[37] Nonetheless, the ECHR had a discernible bearing on the development of the law of judicial review, increasingly being used to ensure that exercises of administrative discretion were examined through the lens of human rights.[38]

Additionally, the exercise of judicial discretion was also shaped by reference to the ECHR, albeit to a lesser extent. Thus, the High Court took Article 10 of the ECHR into account when deciding whether an advert promising a certain level of prize money was fair, as no prizes of that value had been won.[39] Similarly, in *Rantzen v Mirror Group Newspapers*,[40] the Court of Appeal held that its exercise of its power to substitute its own award of damages for that of the jury should be carried out in such a way as to take Article 10 of the ECHR fully into account. The ECHR was also considered relevant to the exercise of judicial discretion in

[33] ibid. In this case the Court then applied the *Wednesbury* reasonableness test to the question of whether it was lawful to exclude homosexual men from the military and ruled that it was not unreasonable. This case was appealed to the ECtHR who found in favour of the applicants, *Smith and Grady v United Kingdom* [1999] IRLR 734.
[34] In *R v Secretary of State for Transport, ex p Richmond-upon-Thames Borough Council (No 4)* [1996] 1 WLR 1460.
[35] In *Brind*, n 12.
[36] Clayton and Tomlinson (n 3) para 1.35. See also Fordham (n 30).
[37] *Smith and Grady v United Kingdom* [1999] IRLR 734, see also (n 27).
[38] Hunt discusses how the influence of human rights on administrative law developed in significant detail, see Hunt (n 1) chs 4 and 5.
[39] In *R v Advertising Standards Authority Ltd, ex p Vernons Organization Ltd* [1992] 1 WLR 1289. See also *Middlebrook Mushrooms Ltd v Transport and General Workers' Union* [1993] IRLR 232.
[40] *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670.

criminal cases, such as *R v Kahn*,[41] which concerned the court's right to exercise its discretion to exclude certain evidence in criminal trials. From these examples it is evident that the judiciary was increasingly willing to use the ECHR in decision-making prior to its incorporation, an important development in relation to procedural fairness.[42]

7.2.3 The ECHR and the Common Law

The final area in which Lord Bingham noted the ECHR had had a significant impact on the development of the law prior to incorporation was in respect of the common law.[43] One example of this influence is found in the judgment of Lord Goff in the *Spycatcher* case. There he said, "I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the ECHR]."[44] Thus illustrating that he not only believed it possible to use the ECHR as a means of interpretation, but that it was *obligatory* to do so.

The question of whether there existed an obligation to take the ECHR into account in relation to the common law was again examined in *Derbyshire County Council v Times Newspapers Ltd*.[45] The issue under examination by the Court was whether a local authority was permitted in English law to raise an action for libel. The law on the area was unclear and there had been no previous judgment on the question from either the Court of Appeal or the House of Lords. Given the uncertainty, Balcombe LJ noted that "where the law is uncertain, it must be right for the court to approach the issue before it with a predilection to ensure that our law should not involve a breach of article 10."[46] Nor was Balcombe LJ alone in this view: Ralph Gibson LJ said that if "it is not clear by established principles of our law that the council has the right to sue in libel… then, as is not in dispute, this court must, in so deciding, have regard to the principles stated in the

[41] [1997] AC 558.
[42] Although this is the case, there was no coordinated and consistent approach to the ECHR which was evident through the whole of the judiciary.
[43] *R v Lyons* (n 5) para 19.
[44] *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283. Although in that case Lord Goff suggested there was in fact no inconsistency between Article 10 of the ECHR and the existing English law in relation to freedom of expression.
[45] [1992] 1 QB 770 (Court of Appeal), [1993] AC 534 (House of Lords).
[46] ibid 813 (Court of Appeal).

Convention".[47] Moreover, Butler-Sloss LJ said that "where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but in my judgment *obliged* to consider the implications of Article 10."[48]

Following this judgment, the case was appealed to the House of Lords which upheld the decision of the Court of Appeal. Whilst the House of Lords did not make its decision by reference to the ECHR it did nothing to contradict the opinions of the court below. Lord Keith noted:

> Lord Goff of Chieveley in *A-G v Guardian Newspapers (No 2)*… expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and article 10 of the Convention. I agree and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field.[49]

Later on, the Court of Appeal held that the ECHR could be used as a method of "reinforcing and buttressing" the court's conclusions.[50] Previously, the Court of Appeal had accepted counsel's submission that "The fact that the Convention does not form part of English law does not mean that its provisions cannot be referred to and relied on as persuasive authority as to what the common law is, or should be."[51]

Whilst this view held currency with the courts, it was nonetheless challenged by some commentators. Clayton and Tomlinson, for example, argue that "As a matter of strict analysis… the claim that unincorporated treaties are a legitimate tool for the development of the common law where it is otherwise ambiguous is open to question."[52] They further note that "there does not appear to have been

[47] ibid 819.
[48] ibid 830. Emphasis added.
[49] [1993] AC 534, 553.
[50] *John v MGN Ltd* [1997] QB 586, 619, per Bingham MR. A similar sentiment had been expressed by the court in *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198.
[51] *R v Mid-Glamorgan Family Health Services Authority, ex p Martin* [1995] 1 WLR 110, 118, per Evans LJ.
[52] Clayton and Tomlinson (n 3) para 2.18.

any decided case in which *certain common law* has been so revized as a result of an unincorporated human rights treaty."[53]

However, they provide no evidence to support this conclusion which seems to fly in the face of a significant degree of judicial decision-making. For example, in *R v Chief Metropolitan Stipendiary Magistrate, ex p Choudhry* the court said, in the context of blasphemy laws as they applied in Engand and Wales, that:

> [Counsel] maintained the common law of blasphemy is without doubt certain; accordingly it is not necessary to pay any regard to the Convention. Nevertheless, he thought it necessary, and we agreed, in the context of this case, to attempt to satisfy us that the United Kingdom is not in any event in breach of the Convention.[54]

Nor was it only the courts which sought to justify the use of the ECHR in their own judgments. Laws LJ, writing extra-judicially, wrote a leading article on the role of the English and Welsh courts in protecting human rights prior to incorporation. In the article he notes that:

> In many areas of the law, development – indeed change – has been wrought by the judges because they have paid attention to evolving social and moral concepts, and to the demands and expectations of modern society… But they have always proceeded by building on existing principle. In doing so, they have not infrequently paid attention to foreign legal texts, and drawn assistance and illumination from them…[55]

Thus, he asks, "Why may the courts not have regard to the ECHR jurisprudence in precisely the same way"?[56]

Examining the impact of the ECHR in these three areas, it seems fair to assert that prior to incorporation the ECHR's impact was significant. Summarising the

[53] ibid 2.19. Emphasis added.
[54] [1991] 1 QB 429, 449.
[55] John Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] Public Law 59, 63.
[56] ibid.

use of unincorporated international human rights treaties in England and Wales, Hunt suggests that: "During… the mid-1970s, domestic judges displayed not only a willingness to interpret domestic law in the light of international human rights instruments, but often considered themselves under an obligation to do so."[57] Hunt singles out Lords Denning, Reid and Scarman as leading figures in developing this approach. He asserts that particularly in respect of these three judges "both statute and common law were interpreted so as to be consistent with international human rights norms".[58] Although he goes on to argue that despite this initial willingness to ensure compliance with international human rights law, judges began to use "the classic sovereigntist device of 'ambiguity', permitting [them] to retain, in effect, a discretion as to whether international norms [were] relevant at all to a question of interpretation of domestic law." [59] Nonetheless, this the use of the EHCR developed, and towards the middle of the 1990s and the passage of the Human Rights Act, there was "gradual judicial acceptance of a full interpretive obligation in relation to international human rights standards."[60]

While these developments were welcome, as they enabled the courts increasingly to use the ECHR as a benchmark for human rights protection, they were entirely reliant on the discretion of judges. Moreover, it was possible that such exercises of discretion could be overruled on appeal. Finally, with Parliament sovereign to pass any law it wished, it remained easy for Parliament to clarify an ambiguous law to the exclusion of the ECHR's protections, or to pass a law codifying the common law in a manner incompatible with the ECHR. Thus, the protections offered by the courts' willingness, whilst important, were highly precarious.

7.3 The UK and the ECtHR

Although this thesis and its underlying research question address the question of the interaction between domestic law and human rights, an examination of the

[57] Hunt (n 1) 160.
[58] ibid.
[59] ibid 161.
[60] ibid 131.

relationship between the UK and the ECtHR allows for the trends observed at the domestic level to be verified and validated. For that reason, this section examines the UK's relationship with the ECtHR and UK's record before the ECtHR. It will particularly look at whether the increase in use of the ECHR rights as a method of clarifying and developing domestic law had any effect on the UK's record at the ECtHR. This allows for direct comparison of UK's track record at the ECtHR pre- and post-incorporation of the ECHR, which will enable an assessment of the impact of incorporation on the UK's compliance with the ECHR. It examines this at the UK level as the data is not sufficiently detailed to allow it to be examined at the level of the UK's constituent nations; nonetheless, the focus remains, insofar as possible on the law relating to England and Wales.

In 2012, the Equality and Human Rights Commission (EHRC) commissioned a significant piece of research into the UK's relationship with the ECtHR.[61] The subsequent report makes clear that deriving and analysing meaningful statistics from the data provided by the ECtHR is extremely difficult as rules and procedure have changed significantly since the UK accepted the right to individual petition to the ECtHR in 1966.[62] Nonetheless, even the most cursory examination of the UK's track record before the ECtHR during this period highlights that fact UK law was not, as some had supposed, fully compliant with the ECHR.[63] As the graph below shows, the number of judgments finding violations of the ECHR by the UK increased over the years between 1975[64] and 1998.[65] This of itself does not

[61] Alice Donald, Jane Gordon and Philip Leach, *Research Report 83: The UK and the European Court of Human Rights* (Equality and Human Rights Commission 2012). This study warns that such analysis must be approached with caution, noting that "…care is required when interpreting data relating to the number of applications brought against the UK… Fluctuations in figures may be attributable to repetitive or 'clone' cases, i.e. batches of cases which have the same root cause… Figures may also fluctuate according to the productivity of the Court in processing cases and producing judgments", ibid 34. Nonetheless, such data can help to paint a picture of how well the UK has fared at the ECtHR.

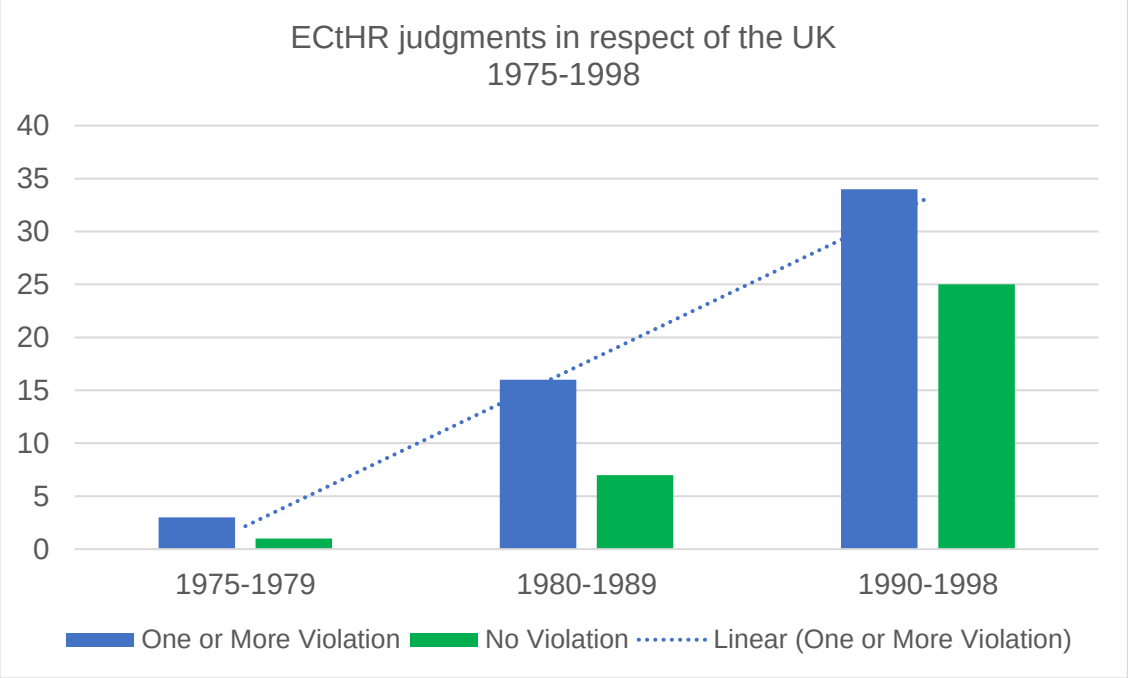
[62] ibid 4.

[63] See, e.g., the discussion in AW Brian Simpson, *Human Rights and the End of Empire* (Oxford University Press 2001); Ed Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press 2010).

[64] Although the UK recognised the right to individual petition in 1966 the first judgment against the UK was not until 1975 (*Golder v UK* (1975) 1 EHRR 524), the UK lost the case. It is interesting to note that the UK was one of the first five states to have a judgment delivered in respect of it at the ECtHR, see Bates (n 63) 527.

[65] This graph is based on data gathered by the House of Commons Library in Joanna Dawson, 'Briefing Paper: UK Cases at the European Court of Human Rights since 1975' (House of

suggest that there were vastly more human rights breaches in the 1990s than in the 1970s: it could, for example, be explained by lawyers becoming more aware of the possible recourse to the ECtHR. However, it does show that the UK's approach to human rights did not prevent violation of the ECHR occurring.[66]

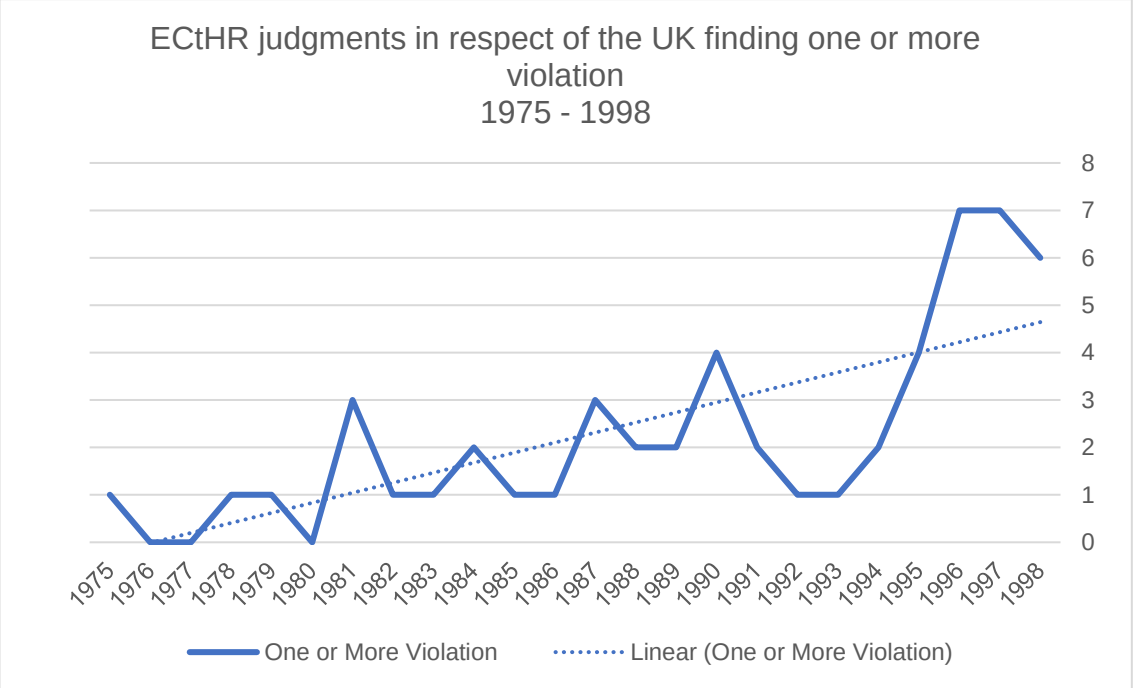


Moreover, looking solely at judgments finding violation it is very clear that the UK lost an increasing number of cases before the ECtHR during this period.[67]

Commons Library 2019) CBP 8049. The data above reflects the fact that the case of *Ireland v UK* [1978] ECHR 1 has been removed as it related to an inter-state complaint rather than to the enforcement of individual rights. This data also excludes cases where a friendly or other settlement was reached.

[66] Figures taken from the ECtHR's statistics (<https://www.echr.coe.int/Pages/home.aspx?p=reports&c=> accessed 18 December 2020) and Donald, Gordon and Leach (n 61). Although the number of cases finding no violation also increased, this graph illustrates clearly the fact that any suggestion that the UK's approach to human rights was highly effective was incorrect.

[67] This data and the data for the previous chart reflect judgments in respect of all the constituent nations of the UK, i.e. Northern Ireland, Scotland, England and Wales, as the ECtHR does not provide data beyond country level. It also reflects, to an extent, the increasing workload of the ECtHR. Figures taken from the ECtHR's statistics (<https://www.echr.coe.int/Pages/home.aspx?p=reports&c=> accessed 18 December 2020) and ibid.



The fact that there was such a clear increase in findings of violation being made by the court serves to highlight that, despite the judiciary's increasing use of the ECHR as an interpretive tool, UK law was still failing to comply fully with the ECHR.

The judgments of the ECtHR also had some limited impact on the UK's own relationship with the ECHR system. These judgments are declaratory in nature, thus there remained significant scope for the UK to develop its law in its own way in response to the judgments of the ECtHR.[68] As Kunz notes, the ECtHR had adopted, and adhered to, "a very dualist view, highlighting the essentially declaratory nature of its judgments and leaving it up to the states concerned to choose the means to redress breaches."[69] The ECtHR itself made this approach clear when it held that:

[68] Article 46(1) reads "The High Contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties." But as Schabas notes "Judgments of the [ECtHR] are not directly enforceable in a manner similar to that of judgments of domestic courts." William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 860. He goes on to note that "The [ECtHR] has described findings of violation in its judgments as being 'essentially declaratory'", ibid 866. Quoting, *inter alia*, *Verein gegen Tierfabriken Schweiz v Switzerland (No 2)* App no 32772/02, para 61, and *Lyons and Others v United Kingdom* App no 15227/03.

[69] Raffaela Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts' (2019) 30 European Journal of International Law 1129, 1136.

> [The] decision cannot of itself annul or repeal these provisions: the Court's judgment is essentially declaratory and leaves to the state the choice of means to be utilised in its domestic legal system for the performance of its obligation under Article 35.[70]

Masterman notes that "to think that [ECtHR] jurisprudence could be followed or applied in the manner of precedents would be a mistake".[71] Nonetheless, as commentators such as Beloff and Mountfield show, the courts of England and Wales did set some store on the ECtHR's rulings when making decisions.[72] Thus, for example, in *Rantzen v Mirror Group Newspapers* the High Court relied directly on jurisprudence of the ECtHR in relation to freedom of expression.[73] Whilst it is evident that the courts of England and Wales were willing to look to the ECtHR as part of their decision-making process, nonetheless there was no requirement for them to do so prior to the Human Rights Act.

7.4 The ICCPR and the UK

The ICCPR did not enter into force until 1976. As has been shown, by that point the ECHR had already begun to gain traction as an interpretive tool within the courts. By contrast, the ICCPR was almost completely unused in the courts of England and Wales between 1976 and 1998. Indeed, "In 1984, the United Kingdom Government's representative to the UN Human Rights Committee was unable to identify even one case in which the British Courts had made reference to the Covenant."[74] Writing in 1995, Klug, Starmer and Weir note that "The United

[70] *Case of Marckx v Belgium* App no 6833/78, judgment of 13 June 1979, para 58.
[71] Roger Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and "the Convention Rights" in Domestic Law' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial reasoning under the UK Human Rights Act* (Cambridge University Press 2007) 64.
[72] Michael Beloff and Helen Mountfield, 'Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales' [1996] EHRLR 467.
[73] [1994] QB 670, 696 per Neill LJ.
[74] Clayton and Tomlinson (n 3) para 2.56.

Kingdom ratified the [ICCPR] in May 1976, but has since done nothing substantial to give effect to ratification or even publicly to recognise it."[75]

The ICCPR itself creates an obligation on states parties to give effect to the treaty within their national legal systems. Article 2(2) reads:

> Where not already provided for by existing legislative or other measures, each state party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Convention.

In his commentary on the ICCPR, Nowak notes that as a matter of international law "it is left to States parties to a treaty how they implement their international obligations. Of sole importance is the result of implementation, i.e., the respect for and assurance of the rights of the convention [sic]."[76] Indeed, Article 2 "contains no obligation on the states parties to incorporate the Covenant into the domestic legal system".[77] Despite this, Nowak notes that the HRC has "In recent years… put increasing pressure on States parties… to incorporate the Covenant in domestic law."[78] Even if a state party does not immediately legislate for the domestic legal effect of the ICCPR, Article 2 "does not rule out… that Sates parties shall also achieve progress in domestic implementation *after* ratification", particularly given the obligations on states "to ensure (fulfil and protect) Covenant rights by means of positive measures."[79]

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[75] Francesca Klug, Keir Starmer and Stuart Weir, 'The British way of doing things: the United Kingdom and the International Covenant of Civil and Political Rights, 1976-94' [1995] Public Law 504.
[76] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition, N P Engel 2005) 57.
[77] ibid.
[78] ibid 58 Nowak's comments date this push for domestic legal measures to the early 1990s. In respect of the UK, after 1998 the HRC noted with concern "that the Covenant is not directly applicable in the State party." UN Human Rights Committee 'Concluding observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc CCPR/C/GBR/CO/6, para 6. See chapter 8 for more discussion on this.
[79] Nowak, ibid, 62. Emphasis in original.

Nonetheless, in the period following the entry into force of the ICCPR, Parliament took no legislative action to ensure that the treaty rights were given effect in UK law generally.[80] Nor, as has been shown, did the courts undertake to use the ICCPR as a part of the decision-making process, as had been done with the ECHR. In fact, "the then Labour government was content to assume, as every government has done since, that no changes were necessary because the rights and freedoms recognised in the Covenant are inherent in the United Kingdom's legal system and are protected by it and by Parliament."[81]

As Harries notes, "it is not easy to answer in the abstract the question of whether a party complies with its obligations under the… ICCPR".[82] This is because "In the great majority of situations… the question is one of interpretation and application of the ICCPR text, which is a matter for the HRC."[83] But "Since the United Kingdom is not a party of [Optional Protocol 1], the HRC has had no opportunity to give a ruling upon United Kingdom compliance with its obligations under the ICCPR in the context of individual communications."[84] Nonetheless, Klug, Starmer and Weir assert that:

> From the UK's very first [periodic] report, in 1979, members of the [HRC] have been sceptical about the ability of arrangements here to protect human rights in the absence of either constitional [sic] guarantees of such rights or the incorporation of the Covenant in domestic law. Their scepticism increased when they found that the 1979 report failed to refer to the legislative texts and judicial decisions which the government claimed gave protection to the rights and freedoms provided for in the Covenant. Members asked, for example, how a citizen who complained that a Covenant right had been violated could be sure of an effective remedy when, in accordance with

[80] There is one exception to this rule: s 133 of the Criminal Justice Act 1988 which gives effect to Article 14(6) but there has been no coordinated action to give domestic effect to these rights in statute or otherwise.
[81] Klug, Starmer and Weir (n 75) 505.
[82] David Harris, 'The International Covenant on Civil and Political Rights and the United Kingdom: An Introduction' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon 1995) 46.
[83] ibid.
[84] ibid.

> the principle of Parliamentary supremacy, Parliament could make any law and the courts were powerless to question it.[85]

This scepticism continued with the HRC wondering whether, "given the fact that there was no written constitution and no written bill of rights and that the courts operate on the basis of common law precedents… the United Kingdom was in fact in a position to 'ensure' that the Covenant's provisions were given proper effect".[86] Klug, Starmer and Weir note, that as the years progressed, the HRC's members were increasingly exercised about this position and increasingly unwilling to accept at face value the UK's assertions that it complied with its obligations under the ICCPR.[87]

Given the reticence of the UK to address in any depth its compliance with the ICCPR and the lack of action to enhance compliance by means of domestic law, it is hard to point to any concrete difference made by the ICCPR to the protection of induvial rights in the UK generally, or England and Wales in particular. The sole exception to this being the Criminal Justice Act 1988 which incorporated the protections in Article 14(6) relating to the award of damages for the victims of miscarriages of justice.[88] This lack of change brought about by the ICCPR within the UK is confirmed by the comments of the HRC in respect of the UK's periodic reporting.[89]

As is discussed below, a number of draft bills of rights for the UK were prepared in the early 1990s some of which made use of both the ECHR and the ICCPR.

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[85] Klug, Starmer and Weir (n 75) 506–507.
[86] UN HRC's comments on the United Kingdom's report submitted 3 September 1984, quoted in ibid 507.
[87] ibid 506–509. Amusingly, they note that in one hearing the Mauritian member of the HRC noted that "Part of the legacy which the UK had left his country was a Bill of Rights; 'I hope you will give yourselves one too'." ibid 509.
[88] As is shown in the next chapter, this act of partial incorporation is responsible for the majority of references to the ICCPR in the judgments of the courts of England and Wales.
[89] See, e.g., UN Human Rights Committee 'Report of the Human Rights Committee' (10 October 1991) UN Doc A/46/40, the concluding observations in relation to the UK's periodic report can be found at paras 351-414 and highlight a range of concerns on the part of the HRC with the securing of the rights protected by the ICCPR. Moreover, as is discussed in section 8.5 of chapter 8, the HRC still took the view that the ICCPR had not been implemented fully in UK even *after* the Human Rights Act. See UN Human Rights Committee 'Concluding observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc CCPR/C/GBR/CO/6.

However, nothing came of the ICCPR's inclusion in these drafts and the ICCPR made little impact on the protection of individual rights in the UK after its entry into force.

Writing during this period, McGoldrick and Parker suggest that the ICCPR did have some limited impact on the Government, saying:

> The [ICCPR] plays a role in the formulation of British Government policy, both at home and abroad. At home, draft legislative or other proposals are scrutinized by the Foreign and Commonwealth Office Legal Advisors if it is thought there is any risk of incompatibility with the UK's international obligations, including those under the [ICCPR]. *It is fair to say that it is generally the European Convention which is uppermost in everyone's mind when considering the United Kingdom's human rights obligations*…[90]

But the idea that the ICCPR plays any significant role in such considerations is hard to square with the observations of the HRC and the research carried out both in this thesis[91] and by Klug, Starmer and Weir. McGoldrick and Parker themselves go on to note that "the Covenant is yet to make a marked impact on the consciousness of the British public or on much of the government."[92] As the analysis below shows, there were only six references in reported judgments in England and Wales which mentioned the ICCPR prior to the passage of the Human Rights Act in 1998.[93]

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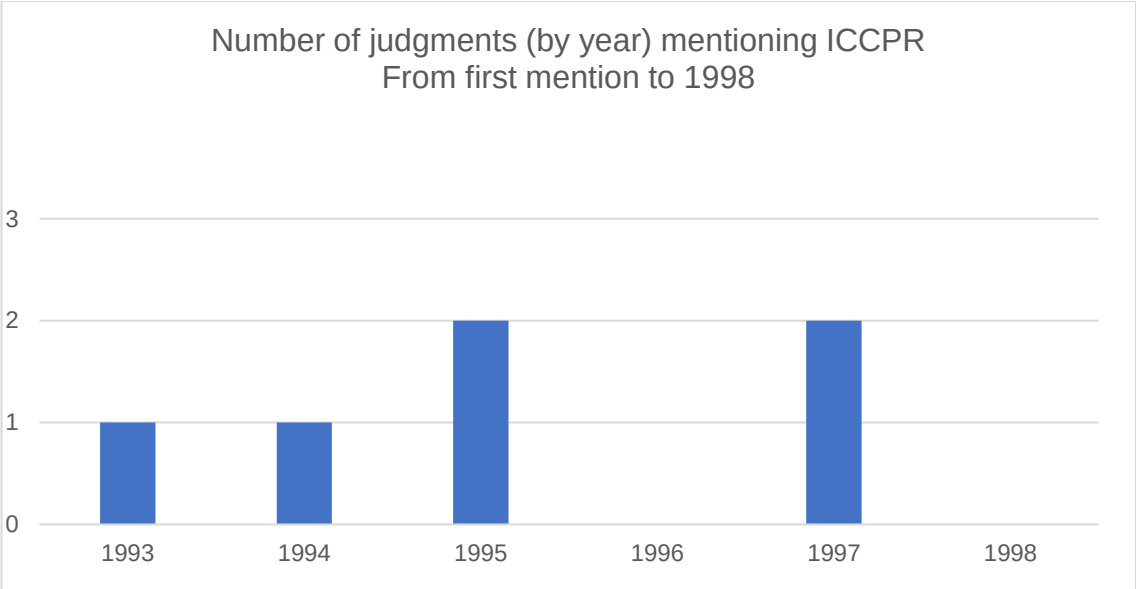
[90] Dominic McGoldrick and Nigel Parker, 'The United Kingdom Perspective on the International Covenant on Civil and Political Rights' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon 1995) 88. Emphasis added.

[91] *Viz* an examination of the literature on the ICCPR and the UK (with a focus on England and Wales), as well as an examination of cases which cited the ICCPR.

[92] McGoldrick and Parker (n 90) 89.

[93] Moreover, a wider analysis mentioned in Klug, Starmer and Weir which included examining counsels' arguments as well as court judgments found a total of ten cases between 1972 and 1993 where the ICCPR had been mentioned, and mentions of the ICCPR in Parliament were even less frequent: Klug, Starmer and Weir (n 2) 508. A similarly broad survey by Hunt also highlights the paucity of judgments referencing the ICCPR in England and Wales, Hunt (n 1) Appendix 1.



These six cases themselves, moreover, highlight the unwillingness of the courts to engage with the ICCPR in any depth, even when it is directly mentioned. Of the six, the case which addressed the ICCPR in the most detail related to s 133 of the Criminal Justice Act 1998.[94] The rest did not engage with the ICCPR beyond an initial mention or observation,[95] and one rejected the use of the ICCPR outright.[96] Despite the UK having played an active role in the development of ICCPR,[97] during this period it did not make any significant use of the treaty in its domestic law, beyond the Criminal Justice Act 1988. Moreover, the ICCPR had not by 1998 embedded itself in the consciousness of either the public or of politicians, nor had it permeated the thinking of the judiciary in any meaningful way (as the survey of the relevant case law carried out for this thesis shows). By

[94] *R v Secretary of State for the Home Department, ex p Bateman* (1995) 7 Admin LR 175. This case related to whether compensation was available under s 133 of the Criminal Justice Act for victims of miscarriage of justice where the miscarriage was based on judicial error rather than facts. The application was dismissed.

[95] For example, *Airedale NHS Trust v Bland* [1993] AC 789. This case related to a patient in a permanent vegetative state whom doctors wished to stop feeding, the official solicitor intervened. The Court held that as the patient could not consent it was for the doctors to make a decision. The Court noted that whilst it would not be legal to take a positive action which accelerated or caused the patient's death, it was, in some cases, permissible to withhold life-sustaining treatment. Reference was made to Articles 6 & 7 of the ICCPR relating to the right to life and prohibition on inhuman and degrading treatment respectively.

[96] *R v Ministry of Defence, ex p Smith* [1995] EWCA Civ 22, [1996] QB 517. This case related to whether it was lawful for the Ministry of Defence to prohibit homosexuals from serving in the armed forces. It was held that the ban was lawful (although on appeal the ECtHR ruled that this was a breach of the ECHR, see *Smith and Grady v United Kingdom* [1999] IRLR 734). The Court made reference to Article 26 of the ICCPR, protecting freedom from discrimination.

[97] Discussed in chapter 4.

contrast to the ECHR during the same period, it is clear that there was no uniquely ICCPR-based jurisprudence being developed by the courts in the same way as was happening with the ECHR itself. Indeed, in the context of England and Wales in these years, it is difficult to see any meaningful change which the ICCPR bought about for the protection of individual rights.

7.5 Did the ECHR and ICCPR Influence Judicial Decision-Making?

This section will assess whether the UK becoming party to both the ECHR and ICCPR resulted in any change in approach by the courts of England and Wales when making decisions which impacted upon human rights. This will provide a snapshot of the impact of both treaties prior to the incorporation of the ECHR. It is necessary to understand the change brought about by incorporation, and therefore to answer the thesis question.

7.5.1 The ECHR

Vick asserts that "In contrast to the importance attached to the democratic accountability of Parliament, institutional checks and balances, and the rule of law as a means of safeguarding individual civil liberties, comparatively little significance was attributed to the [ECHR] before the passage of the Human Rights Act."[98] However there was, certainly amongst the judiciary, a long, slow development of the use of the ECHR as a means of developing and clarifying the law of the UK between 1953 and the introduction of the Human Rights Act in 1998. As noted above, Lord Bingham highlighted in *Lyons* there were at least three areas in which the ECHR had led to the development of the law of England and Wales: the interpretation of statutory provisions, the exercise of discretion, and the development of the common law in respect of rights.[99] Although Vick,

[98] Douglas W Vick, 'The Human Rights Act and the British Constitution' (2002) 39 Texas International Law Journal 329, 344.
[99] *R v Lyons* (n 5) para 13. Hunt adds to this the influence of the ECHR as part of European Community (EU) law, Hunt (n 1) 128. Whilst this is addressed briefly above, it is the three areas identified by Bingham which it is argued are key to this assessment the use of the ECHR by the courts in the UK during this period of time.

discussing the same three areas, suggests that the effects of these judicial developments were "limited".[100]

It is certainly the case that any suggestion that the ECHR quickly became a central part of judicial reasoning is wrong. As Hunt asserts "For more than twenty years following the entry into force of the ECHR, on 3rd September 1953, it had *no domestic impact whatsoever*."[101] The sudden shift from an absence of impact to the judicial uses of the ECHR described above raises the question of why the approach changed. Hunt posits that "The timing of the development was undoubtedly related to the slowly dawning awareness of the potential significance of the ECHR system" and the realisation that since the UK had accepted the right of individual petition to the ECtHR in 1966 the first cases were being brought against the UK there for breaches of ECHR rights.[102] In his Hamlyn lectures, Lord Scarman argued that there were two ways in which the UK could respond to these developments: ignore them completely or create a new legal framework for the protection of rights.[103] Nonetheless, as Hunt notes, "in a series of judicial decisions in the mid-1970s, certain English judges, including Lord Scarman himself, demonstrated that there was a third option available", this use of the ECHR as a tool for developing the common law.[104]

With this new-found way of squaring the circle, judges in England and Wales were undoubtedly influenced in their decision-making by the ECHR. Indeed, in a remarkably succinct article in 1996, James Maurici outlined ten ways in which the courts had been willing to use the ECHR as part of their reasoning:

> Although the Convention 'is not law':
>
> (1) "English Courts will strive when they can to interpret statutes as conforming with the obligations of the United Kingdom under the Convention"…

[100] Vick (n 98) 345.
[101] Hunt (n 1) 131. Emphasis added.
[102] ibid 133.
[103] Leslie Scarman, *English Law – The New Dimension* (Stevens & Sons 1974).
[104] Hunt (n 1) 133.

(2) The Convention can be used to resolve a legislative ambiguity…

(3) The Convention can be used where the common law is developing and uncertain or where it is certain but incomplete; further, the Convention reflects certain co-extensive rights already recognised by the common law…

(4) The Convention is a relevant source of public policy…

(5) The Convention can be used when determining the manner in which judicial powers are to be exercised…

(6) The Convention can be used to review the exercise of a power conferred for the purpose of bringing domestic law into line with the Convention…

(7) The Convention can be used as something to which regard should be had where it is referred to (albeit not incorporated) in Ministerial Guidance…

(8) The Convention may be a relevancy in the exercise of a discretion…

(9) The Convention may be incorporated into domestic law via Community Law…

(10) The Convention may have implications for the development of the right to reasons…[105]

That most of these uses developed after 1990 supports Hunt's assertion that "from about the beginning of the 1990s, a new and distinct phase was entered in the domestic history of human rights law."[106]

Despite the fact that the ECHR's influence on judicial decision-making increased during this period, and had a significant impact upon the protection of human rights in England and Wales, by 1993 Lord Bingham noted that "the ability of

[105] James Maurici, '10 Ways to Rely on the Human Rights Convention' (1996) 1 Judicial Review 29, 29.
[106] Hunt (n 1) 205.

English judges to protect human rights in this country… is inhibited by the failure of successive governments over many years to incorporate into United Kingdom law the European Convention on Human Rights and Fundamental Freedoms."[107] Nonetheless, it is clear that during this period the ECHR not only began to form part of judicial decision-making, but also began to have a significant influence on it. Whilst this, of itself, could not ensure that all of the rights contained in the ECHR could be secured all of the time, it did mark a significant improvement on the approach which had been adopted prior to 1953.[108]

7.5.2 The ICCPR

By contrast, the ICCPR did not have such an impact. The courts were not quick to apply the ICCPR in the way they had been in the case of the ECHR. Indeed, writing in 1995, Klug, Starmer and Weir assert that nothing significantly changed as a result of the ICCPR in England and Wales:

> No changes in domestic law were made to comply with its Articles, the United Kingdom has not signed the Optional Protocol – giving British subjects the right to petition the UN Human Rights Committee – and scarcely meets its reporting obligations under the Covenant. The UN Committee and indeed the Covenant have therefore had a very limited impact upon the quality of political freedom in this country.[109]

Writing more generally, Cunningham echoes this sentiment. He suggests that, "the European Convention apart, there is something of a paucity of English cases in which any reference to unenacted human rights treaties or other instruments is found."[110] As outlined above, even in the rare cases in which the ICCPR *is* mentioned in a judgment, it did not have a significant impact. It was not relied upon by the courts in a manner which made it central to the decision-making in any one of the cases in which it was used during this period. Indeed, it is

[107] Tom Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 Law Quarterly Review 390, 390.
[108] Discussed in chapter 6.
[109] Klug, Starmer and Weir (n 2) 504.
[110] Andrew J Cunningham, 'The European Convention on Human Rights, Customary International Law and the Constitution' (1994) 43 International & Comparative Law Quarterly 537, 551.

impossible to point to a single instance where it could be argued that the ICCPR made any impact whatsoever on judicial reasoning.

Summing up the position and impact of the ICCPR on the law of the UK broadly, Higgins, writing in the early 1990s, asserts:

> I think that the judiciary have no familiarity even with the text of the Covenant and the obligations there undertaken by the United Kingdom… Indeed, I suspect that the judiciary is only in the most general terms aware that the United Kingdom is a party to the Covenant, but… knows almost nothing of its substantive requirements or the institutions that monitor compliance with obligations.[111]

Taken together, it seems fair to argue that the ICCPR had little, if any, influence on judicial decision-making in the UK generally, and England and Wales specifically, during this period. It is impossible to point to a single case where mentioning the ICCPR altered the outcome. By contrast, during this period, the courts began to use the ECHR as a means of developing the law of human rights in England and Wales in a consistent manner. Although reasons have been put forward for this difference, such as the lack of a right of individual petition to the HRC and the lack of knowledge of the ICCPR amongst the judiciary,[112] there is no clear reason for the *vast* difference between the treatment of the two by the courts. Given the difference in rights protected by the ICCPR and ECHR, the absence of judicial use of the ICCPR in English and Welsh law during this period represents a missed opportunity. This seems particularly true given that several draft bills of rights in this period used both instruments as their foundation, as is discussed below.

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[111] Rosalyn Higgins, 'The Relationship between International and Regional Human Rights Norms and Domestic Law' (1992) 18 Commonwealth Law Bulletin 1268, 1269. Interestingly, Higgins traces this difference to the fact that the UK rejected the right to individual petition in respect of the ICCPR (having accepted it in respect of the ECtHR) arguing that, because of this, "There are thus no reports on findings in the press, and no public or judicial awareness of the obligations undertaken under the Covenant and the United Kingdom's position in respect of them." ibid.

[112] This remained an issue even after incorporation as the HRC noted that the impact of the ICCPR in the UK could be improved by the UK making "efforts to ensure that judges are familiar with the provisions of the Covenant." UN Human Rights Committee 'Concluding observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc CCPR/C/GBR/CO/6, para 6.

7.6 The Bill of Rights Debate

Throughout the period of time when the courts were developing human rights in the common law by reference to the ECHR, there were calls for the incorporation of the ECHR into domestic law. This section examines how the debate on a bill of rights for the UK developed, and led to the incorporation of the ECHR by way of the Human Rights Act.

The UK's constitutional structure makes an entrenched bill of rights impossible: parliamentary sovereignty is incompatible with any form of higher law.[113] Nonetheless, as Lord Hoffmann asserted, prior to the Human Rights Act it was not the case that issues which could be described as human rights related had been left unattended by Parliament. He notes that "Parliament… had no difficulty in legislating in many areas of human rights".[114] He goes on to highlight the spheres in which Parliament had taken action, including: "the legislation decriminalising suicide, abolishing the death penalty, against racial discrimination, regulating abortion, against sex discrimination, regulating the conduct of the police in the investigation of crime".[115] Nonetheless, as this section illustrates, there was much debate surrounding the best way to continue this rights-focused legislation.

7.6.1 Initial Debate

Although it did not come to fruition until 1998, the debate on a bill of rights for the UK had begun many decades before.[116] As early as 1969 Viscount Lambton had introduced a bill in the House of Commons which aimed to provide domestic protection of individual rights.[117] Also in 1969, Emlyn Hooson MP did the same,

[113] See chapter 6 for a detailed discussion of the UK constitution and parliamentary sovereignty.
[114] Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 Modern Law Review 159, 160.
[115] ibid. Although none of this legislation made direct reference to the equivalent rights in international law.
[116] For a very detailed account of the debate on a bill of rights for the UK see Michael Zander, *A Bill of Rights?* (4th edn, Sweet & Maxwell 1996) 1–27.
[117] HC Deb 23 April 1969, vol 782, col 474. Lord Lambton was an MP rather than a member of the House of Lords as at the time he held a courtesy title, meaning he was not entitled to sit in the House of Lords itself.

noting that he was "continuing a debate which is exciting more and more interest among thinking members of our society."[118] Neither bill, however, moved beyond the initial debate. Nor did attempts by Lord Arran in 1970[119] or Samuel Silkin MP in 1971.[120] Vick argues that these early moves towards a bill of rights of some nature were driven by "a deepening interest in individual liberties which were *legally enforceable* in the courts and supreme to ordinary legislation."[121]

In 1974, Lord Scarman, then a judge of the Court of Appeal, used his Hamlyn Lectures, entitled "English Law – a new dimension", to call for an entrenched bill of rights.[122] This happened alongside increasing interest in a bill of rights in Parliament, and cross-party support for such a proposal.[123] This increased interest led to Lord Wade reintroducing a bill of rights in the House of Lords. He indicated that "The object of the Bill is to incorporate into the domestic law the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms."[124] This debate resulted in the creation of the House of Lords Select Committee on a Bill of Rights. The committee reported in 1978 with its report indicating that it had considered two issues: first, whether a bill of rights for the UK was, indeed, to be desired and, second, if it was desirable, what form such a bill ought to take.[125] Whilst the Committee was clear that any bill of rights should take the ECHR as its starting point, the members "found it impossible to agree whether such a bill would be desirable."[126]

Amongst the arguments in favour of a bill of rights, the Committee identified the fact that "Experience had shown that domestic law sometimes provided no remedy for breaches of Convention Rights" and that "The Convention would have

[118] HC Deb 22 July 1969, vol 787, col 1519.
[119] HL Deb, 26 November 1970, vol 313, col 243.
[120] Samuel Silkin's attempt got as far as a second reading (HC Deb 2 April 1971, vol 814, col 1854), but did not receive enough support to proceed further.
[121] Vick (n 98) 346. Emphasis added.
[122] Published as Scarman (n 103).
[123] Clayton and Tomlinson (n 3) para 1.50-1.52.
[124] HL Deb, 3 February 1977, vol 379, col 973.
[125] *Report of the Select Committee of the House of Lords on a Bill of Rights* (HL Paper 176) cited in Clayton and Tomlinson (n 3) para 152. The report is not currently available digitally and access to the Parliamentary Archive was not possible at the time of research due to restrictions imposed as a result of Coronavirus. In the quoted sections of the report, no mention is made of the ICCPR.
[126] ibid 1.52.

a far more practical effect on legislators, administrators, the executive, the judiciary and individual citizens if it became an integral part of UK law."[127] These and other cogent arguments in favour were balanced by a range of arguments against, including the questionable suggestion that the situation in the UK at that time was in accordance with the original philosophy of the drafters of the ECHR.[128] Without a clear recommendation that a bill of rights was desirable, work in this direction stalled following the publication of the Committee's report, although there were another few attempts to introduce a bill on the subject by members of a range of parties in both Houses.[129]

It is interesting to note that during this period, political parties of all colours were opposed to the development of a bill of rights. As Vick asserts, "Perhaps the most surprising was the opposition to these proposals within the left-leaning Labour Party, which might have been expected to support substantive legal protection for… rights".[130] However, the party's opposition stemmed from the view that Parliament was the ultimate expression of majority will and was coupled with a "distrust of the judiciary, which would be charged with enforcing an entrenched charter of liberties."[131]

By the early 1990s, civil society organisations in the UK were beginning to press for some form of human rights settlement, and both Liberty and the Institute for Public Policy Research (IPPR) published drafts of what a bill of rights should look like. Interestingly, both proposals included the ICCPR as part of the basis for the draft document.[132] Evans notes that the main architect of the IPPR's approach was Lord Lester, and that this draft bill "evoked the strengths of both the ICCPR and ECHR".[133] Despite this, Evans argues that "while the IPPR's draft was

[127] ibid 1.53 summarising the main recommendations of the Committee.
[128] ibid. A suggestion which, when examined against the evidence of increasing UK losses before the ECtHR, appears to be totally without basis in fact.
[129] Including Lord Wade, again, in 1979 and 1981; Robert MacLennan MP in 1983; and Lord Broxbourne in 1985. For a fuller discussion of these attempts, which had varying degrees of success, see Clayton and Tomlinson (n 3) paras 1.55–1.56.
[130] Vick (n 98) 347.
[131] ibid. This view was shared by commentators such as Griffith who suggested that judges were likely to "define the public interest, inevitably, from the viewpoint of their own class." JAG Griffith, *The Politics of the Judiciary* (4th edn, 1991), 327, quoted in ibid.
[132] Clayton and Tomlinson (n 3) para 1.56.
[133] Mark Evans, *Constitution-Making and the Labour Party* (Palgrave Macmillan 2016) 178–179.

certainly an improvement on its predecessors, it provided nothing new with which to check the weighty arguments from… adversaries" against such a bill.[134] Liberty's draft was published very shortly after the IPPR's and contained a number of novel suggestions, including removing any limitations on rights on the grounds of national security and proposing that "The final arbiter of the constitution would not be the judiciary or the executive, but the legislature."[135] This reflects Vick's observation that the preeminent view of those particularly on the left of the political spectrum was "that people needed Parliament to protect them from judges as much as judges needed to protect them from Parliament."[136] Nonetheless, later drafts did not adopt Liberty's approach.

A rare argument that incorporation might not be necessary came from Deryck Beyleveld. He argued that the ECHR formed part of domestic law either by way of implied or indirect incorporation and that "English judges at least *may* apply the ECHR directly *at every level, and in every area,* of the English legal system – the ECHR having a legal status not inferior to a Bill of Rights effected by Act of Parliament".[137] This remained, however, a very much unorthodox view, as evidenced by the number and consistency of calls for incorporation to give full domestic effect to the ECHR.[138]

The draft bill which "received the most detailed attention from Parliament" was Lord Lester's Human Rights Bill in 1995.[139] Lord Lester opened the debate in the House of Lords, saying:

> Even though it is not part of our law, the convention is well known in this country as an important means of protecting civil rights and liberties against the misuse of the powers of public authorities of the state. That is because of the many well-publicised and significant cases in which the United Kingdom has been found by the European Commission and Court of Human

[134] ibid 179.
[135] ibid 180.
[136] Vick (n 98) 347.
[137] Deryck Beyleveld, 'The Concept of a Human Right and Incorporation of the European Convention on Human Rights' [1995] Public Law 577, 577–578. Emphasis in original.
[138] See, e.g., Laws' statement "That the ECHR is no part of domestic law is elementary." Laws (n 55) 61.
[139] Clayton and Tomlinson (n 3) para 1.58.

> Rights to have breached the convention. In the absence of effective domestic remedies, there have been more findings of serious and significant breaches of the convention by the UK than by any other contracting state.[140]

He argued it was clear from the repeated findings against the UK by the ECtHR that it was evident that the status quo, with no incorporated human rights protection, was clearly ineffective when it came to protecting individual rights.

Interestingly, Lester's bill sought to mirror the style of the (now repealed) European Communities Act 1972, where, in his words "Parliament retains its sovereign power to repeal or to amend the Bill; but, unless and until it does so in plain terms, British courts are directed to interpret existing and future legislation so as to comply with convention law, just as they now do in giving effect to Community law."[141] However, this was rapidly amended by Lester at the committee stage. He:

> …moved an amendment to substitute for the courts' power to override inconsistent legislation a weaker, but significant new rule of statutory interpretation requiring that 'So far as the context permits, enactments (whenever passed or made) shall be construed consistently with' Convention rights and freedoms. That provision was modelled on the New Zealand Bill of Rights 1989…[142]

This change reflected his view that the earlier proposal might be seen "as enhancing judicial power and limiting the actual, if not the theoretical, powers of Parliament."[143] Presciently, when writing about his bill, Lester noted, entirely accurately as it would transpire:

> Like the three previous Bills passed by the Lords, my Bill will die in the Commons for want of Parliamentary time. However, it seems likely that most

[140] HL Deb, 25 January 1995, vol 560, col 1137.
[141] HL Deb, 25 January 1995, vol 560, col 1138. In fact, the obligation to interpret legislation in compliance went further, as the *Factortame* litigation showed, it allowed the courts to 'disapply' domestic legislation which was not compatible with European Community law.
[142] Lord Lester, 'The Mouse That Roared: The Human Rights Bill 1995' [1995] Public Law 198, 199.
[143] ibid.

> MPs would favour incorporation. The question is no longer whether Parliament will incorporate the Convention but when it will do so. Having unsuccessfully advocated this change for many years, I believe that we will not have to wait much longer to have our fundamental rights secured and protected by the law of the land.[144]

Despite their lack of success, these attempts represented a significant shift in the approach to legal protection of human rights. Vick argues that this sudden move towards support for a bill of rights reflected a "perception that traditional constitutional checks and balances were failing", which could be "traced to the hegemonic rule of the Conservative Party under Margaret Thatcher and John Major in the 1980s and early 1990s."[145] Compounding this was "The apprehension among many (of all political persuasions) that traditional mechanisms for protecting individual rights were breaking down" which was "reinforced by a perception that the European Court of Human Rights was finding the United Kingdom in violation of the [ECHR] with disquieting frequency."[146] Taken together with the increasing support for a bill of rights, these views and the election of a new government in 1997 set the stage for an increase in government support for such a bill for the UK.

7.6.2 Rights Brought Home

In 1997 the new Labour government published its white paper on the Human Rights Bill. In it, the Prime Minister, Tony Blair, highlighted that the development of a UK bill of rights was part of his Government's broader programme of constitutional reform.[147] He said: "The Government is pledged to modernise British politics. We are committed to a comprehensive programme of

[144] ibid 202.
[145] Vick (n 98) 348.
[146] ibid. See section 3 of this chapter for more discussion of the increasing number of ECtHR judgments finding one or more violation in cases involving the UK during this period.
[147] Although, interestingly, Evans argues that the initially radical proposals of the Labour Party regarding the constitution and human rights had, by December 1996, "already begun to diminish as the prospect of electoral victory loomed large." Evans (n 133) 182.

constitutional reform. We believe it is right to increase individual rights, to decentralise power, to open up government and to reform Parliament."[148]

The White Paper justified using the ECHR as the basis of the bill, saying:

> The European Convention is not the only international human rights agreement to which the United Kingdom and other like-minded countries are party, but over the years it has become one of the premier agreements defining standards of behaviour across Europe. It was also for many years unique because of the system which it put in place for people from signatory countries to take complaints to Strasbourg and for those complaints to be judicially determined. These arrangements are by now well tried and tested. The rights and freedoms which are guaranteed under the Convention are ones with which the people of this country are plainly comfortable. They therefore afford an excellent basis for the Human Rights Bill which we are now introducing.[149]

Clearly, the Government did not believe that it was necessary to look elsewhere to other rights treaties, such as the ICCPR,[150] as organisations like Liberty and the IPPR, which had drafted earlier examples of such a bill, had done.

The document also highlighted the fact that the UK remained one of the few countries in the world without some form of domestic human rights protection. It also noted that "Several other countries with which we have close links and which share the common law tradition, such as Canada and New Zealand, have provided similar protection for human rights in their own legal systems."[151] It is evident from the tone of the document that a feeling existed that the UK was isolated in lacking a domestic form of human rights instrument. Of particular note is the White Paper's case for incorporation, which makes clear that the situation

[148] Home Department, *Rights Brought Home: The Human Rights Bill* (White Paper, Cm 3782, 1997) Preface by the Prime Minister.
[149] ibid 1.3.
[150] The White Paper mentions the ICCPR but only in passing, it does not address directly why it was not drawn upon in the drafting of the Human Rights Act.
[151] Home Department (n 148) para 1.13.

which had existed since 1953 did not provide a sufficiently effective mechanism for the vindication of individual rights:

> The effect of non-incorporation on the British people is a very practical one. The rights… are no longer actually seen as British rights. And enforcing them takes too long and costs too much… Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts – without this inordinate delay and cost. It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law.[152]

Most damningly, the paper highlights that "in the Government's view, the approach which the United Kingdom has so far adopted towards the Convention does not sufficiently reflect its importance and has not stood the test of time."[153] Thus, the aim of incorporation was to "make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home."[154]

Clayton and Tomlinson note that "The fact that Britain lagged behind the rest of the world by failing to enact human rights legislation has also been a potent force for change".[155] It was this force which led to the introduction of the Human Rights Bill in 1997. It is telling, however, about how far behind it lagged, that "until the [Human Rights Act] came into force, the United Kingdom was the only Western Member of the Council of Europe in which the Convention was not part of domestic law."[156]

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[152] ibid 1.14. Although is a matter of debate whether the Human Rights Act has succeeded in ensuring that these are seen as "British Rights" today.
[153] ibid 1.15.
[154] ibid 1.19.
[155] Clayton and Tomlinson (n 3) para 1.59.
[156] ibid. Although it is not clear quite how Clayton and Tomlinson define the Western members of the Council of Europe. It is also worthy of note that the UK had also insisted that various of its former colonies had included human rights protections in their constitutions at independence, for example in the 1960 Nigerian constitution. More detail on this is included in Clayton and Tomlinson (n 3) at fn 232.

Perhaps one of the most surprising features of the debate around the development of a bill of rights was "that senior British judges explicitly participated in the process."[157] Not only this, but "[T]he attitude of the senior judiciary towards parliamentary sovereignty significantly affected the shape of the [Human Rights Act]."[158] Whether consciously or not, these contributions are likely to have been informed, to some extent, by the judiciary's experience of using the ECHR as an interpretive tool, as discussed above. In any event, the bill was passed and paved the way for the biggest change in human rights law ever witnessed in the UK.

7.7 Conclusion

It is clear from the development of the law in England and Wales between 1953 and 1998, prior to the Human Rights Act, that the ECHR increasingly had an influence on the way in which the courts made their decisions, particularly where the cases concerned the exercise of discretion, where the existing common law was unclear or uncertain, or where it was necessary to construe an ambiguous statutory provision. The development of a body of human rights jurisprudence in the English and Welsh case law began slowly but then rapidly accelerated from the 1970s onwards. Indeed, there was an explosion in the number of references made by the courts to human rights instruments.

As has been shown, the use of the ECHR in the courts of England and Wales took some time to begin, but once it did began to become a key part of the exercise of judicial interpretation and discretion. Indeed, as previously shown, Lord Bingham asserted:

> …the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law.[159]

[157] Clayton and Tomlinson (n 3) para 1.62.
[158] ibid.
[159] *R v Lyons* (n 5) para 13.

In these three areas the ECHR was used to significant effect to ensure that the decisions of the courts were compliant with the UK's international obligations, and that where possible the will of Parliament could also be interpreted in such a way. Nevertheless, the UK's track record at the ECtHR during these years suggests that whilst the courts were increasingly willing to calibrate their judgments by reference to the ECHR this was not translating into fewer cases being lost before the ECtHR by the UK.

Moreover, as was acknowledged by the UK Government in its proposals for the Human Rights Act, the lack of incorporation meant that the rights engendered no sense of ownership amongst many member of the public and seeking to enforce ECHR rights was a costly and lengthy process.[160] These shortcomings had clearly been recognised by the peers and MPs who had sought over the previous decades to achieve incorporation, and also by organisations such as Liberty and the IPPR who had also attempted to progress the issue.

While these positive developments in respect of the ECHR occurred, however, the new jurisprudence focused almost exclusively on the ECHR, to the detriment of other instruments, in particular the ICCPR. Indeed, as the previous sections illustrate, not only did the courts delay making clear reference to the ICCPR until long after they had considered the ECHR, on the six occasions where such a reference was made the same result would likely have been achieved without reference to the ICCPR itself. This could arguably represent a missed opportunity given that, as Schmidt observes, "The ICCPR displays, in the wording of several of its provisions, more progressive concepts in the protection of the rights of the individual than does the ECHR."[161]

This survey of the situation clearly demonstrates that the ability of individuals to secure their rights effectively had been improved from the pre-1953 residual rights approach by access to the ECHR system, particularly after the UK's

[160] Home Department (n 148) para 1.14. Indeed, in 1997 it took on average five years and £30,000 to bring a case to the ECtHR.
[161] Markus Schmidt, 'The Complementarity of the Covenant and the European Convention on Human Rights – Recent Developments' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon 1995) 629.

recognition of the right of individual petition to the ECtHR. It is less clear that membership of the ICCPR achieved the same, perhaps in large part due to the UK's unwillingness to allow citizens to petition the HRC, coupled with the broadly similar subject matter of the ECHR[162] and a lack of public knowledge around the UK's international human rights obligations. Nonetheless, it was still, prior to the Human Rights Act, extremely time consuming to secure rights and very expensive, delaying and in some cases denying those whose rights had been infringed an effective remedy for the wrong they had suffered.

[162] Although as has been highlighted in chapter 4 although the regimes are broadly similar, the rights protected by the ICCPR are broader than those protected by the ECHR.

8. Human Rights in England and Wales Post-Human Rights Act 1998

8.1 Introduction

This chapter analyses the final period under examination, the years between 1998 and 2018. By examining this phase of the development of human rights protection in England and Wales, this chapter allows for a direct comparison of the periods which preceded it, showing the effect of the incorporation of the ECHR on the courts' ability to enforce human rights.

Given the nature of the UK constitution,[1] the model of human rights protection adopted allows judges to flag issues where human rights are concerned but does not allow courts to set aside acts of Parliament. This has been variously called "the parliamentary model",[2] "weak form review"[3] and "the new Commonwealth model".[4] This model, common to the UK, New Zealand and Canada,[5] is embodied clearly in the Human Rights Act, which incorporates the ECHR into domestic law.[6] As Kavanagh notes, "the distinctive feature of these bills of rights is that while they enhance the powers of the courts to protect rights, they nonetheless allow the elected branches of government to have a greater input into decisions about rights."[7] In other words, the Human Rights Act allows the courts to have a significant role in the protection of human rights, but respects the doctrine of parliamentary sovereignty. This chapter examines how the Human Rights Act has altered the rights landscape in the UK, focusing on England and Wales. First, it

[1] Discussed in chapter 5.
[2] Janet Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 Modern Law Review 7.
[3] Mark V Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009).
[4] Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 American Journal of Comparative Law 707; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge University Press 2013).
[5] See the New Zealand Bill of Rights (1990) and the Canadian Charter of Rights and Freedoms (1982). Both significantly predate the Human Rights Act.
[6] The only *right* which is omitted form the Human Rights Act which forms part of the ECHR is Article 13 which relates to the right to an effective remedy in the domestic setting for a breach of the ECHR. The view was taken that the Act itself effectively provided for this. See, e.g., David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press 2002) 82–83. See section 8.2 for more discussion of this.
[7] Aileen Kavanagh, 'What's so Weak about "Weakform Review"? The Case of the UK Human Rights Act 1998' (2015) 13 International Journal of Constitutional Law 1008.

addresses the Act itself, discussing the tools given to judges under the Act to allow them to have meaningful dialogue with Parliament about the protection of rights, and to give the courts greater power to address human rights breaches which come before them.

This chapter then examines the UK's experience at the ECtHR in the years since 1998. It does this in order to illustrate that the period following the Human Rights Act has witnessed a decline in the number of cases lost by the UK before the ECtHR. This chapter then considers the effect which the Human Rights Act has had on the way that judges engage with cases which raise issues of human rights.

Next, this chapter turns to examine the use of the ICCPR by the courts of England and Wales during this period, in order to draw a comparison between this and the ECHR and to draw attention to the difference in their usage. It illustrates the significant overall increase in reference to the ICCPR since 1998 and highlights a number of trends within this increase in engagement by the courts with the ICCPR. Finally, this chapter notes that although the Human Rights Act has given judges significantly more power to address issues of human rights and that courts have been more willing to use the ICCPR since 1998, there remain concerns about the ability of individuals to secure their rights under the ICCPR in England and Wales.

8.2 The Human Rights Act 1998

The Human Rights Act represented an enormous shift in the way human rights were protected within the UK as a whole.[8] McGoldrick asserts that "Most commentators have assessed the significance of the [Human Rights Act] as enormous to the point of revolutionary."[9] An assertion which seems fair, given the

[8] Lord Hoffmann noted that "The coming of the millennium is traditionally associated with a belief, going back at least to the Books of Daniel and Revelations, that the Kingdom of Christ or some other just ruler will be established, there will be peace and plenty upon earth, and those who have been unjustly treated will receive their rightful rewards. By way of encouragement of this belief, the Government have made the theatrical gesture of timing the coming into force of the Human Rights Act 1998 to coincide with the beginning of the new millennium." Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 Modern Law Review 159, 159.

[9] Dominic McGoldrick, 'The United Kingdom's Human Rights Act 1998 in Theory and Practice' (2001) 50 International & Comparative Law Quarterly 901, 945.

range of academic commentary on the Act and the fact that it represented a sea-change in the domestic protection of human rights. Speaking in the debate about the bill, the Lord Chancellor asserted that "the design of the bill is to give the courts as much space as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament".[10] Lord Sumption later said of the Human Rights Act, that "as is well known, its drafting was a compromise designed to make the incorporation of the Convention into English law compatible with the sovereignty of Parliament",[11] although it is hard to see why the fact that it was designed to respect the UK's constitution should be viewed as a negative compromise.

Whilst the Act is described as having incorporated the ECHR into domestic law, Clayton and Tomlinson note: "The [Human Rights Act] did not take the immediately obvious course of incorporating the [ECHR] into domestic law as a statutory United Kingdom bill of rights, but makes it justiciable in the courts by the indirect route".[12] Despite this, however, the Act seems to be universally regarded as having incorporated the ECHR, as it made the rights contained within the ECHR enforceable in domestic law.[13]

Although it is regarded as having incorporated the ECHR, McGoldrick highlights that "In fact, the [Human Rights Act] 'incorporates' the greater part of the ECHR, but not all of it."[14] Section 1(1) of the Act states that:

> In this Act "the Convention rights" means the rights and fundamental freedoms set out in –
>
> (a) Articles 2 to 12 and 14 of the Convention,
>
> (b) Articles 1 to 3 of the First Protocol, and
>
> (c) Articles 1 and 2 of the Sixth Protocol

[10] HL Deb 3 November 1997, vol 582, col 1228.
[11] *R (on the application of Chester) v Secretary of State for Justice* [2013] UKSC 63, [2013] 3 WLR 1076, para 120.
[12] Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd edn, Oxford University Press 2009) para 3.01.
[13] An examination of the literature on the topic makes clear the fact that commentators view the ECHR as having been incorporated by the Act. See, e.g., McGoldrick (n 9); Clayton and Tomlinson (n 12); Francesca Klug and Keir Starmer, 'Incorporation through the "Front Door": The First Year of the Human Rights Act' [2001] Public Law 654.
[14] McGoldrick (n 9) 906.

Thus, “Article 1 ECHR was not ‘incorporated’ on the basis that it is an interstate guarantee, nor was Article 15 on derogations or the Preamble”, although given the nature of these provisions, their exclusion from the list of rights protected within the UK was not particularly controversial.[15] However, “More significantly, and controversially, Article 13 ECHR on the right to an effective remedy was also omitted.”[16] Article 13 provides for the right to an effective remedy for a breach of the ECHR, but the Government took the view that the Human Rights Act itself effectively provided for this, particularly as s 8 of the Act provided for a range of remedies which the courts could apply where they found a breach of individual rights.[17]

The Act has no special status, is in no way entrenched, and so respects the traditional doctrine of parliamentary sovereignty.[18] Whilst this is the case, it contains a number of provisions which create significant powers and duties allowing for human rights to be protected. Additionally, as Hickman notes, “The Act is very obviously not an ordinary statute, either in form or content.”[19] Given the nature of the change to human rights protection which resulted from the Act this seems fair comment. This chapter thus examines the Act itself, in order to place the method of incorporation in its proper context for later discussion of the change incorporation has brought about.

Kavanagh summarises the areas in which the Human Rights Act significantly changed the legal landscape. She highlights three mechanisms within the Act which improve the protection of human rights. As she notes, two of these were

[15] ibid 907. Although it should be noted that this is not to say that neither Article 1 nor 15 is uncontroversial; thus there has been much discussion about the extraterritorial reach of the ECHR arising from Article 1, see, e.g., Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011).
[16] McGoldrick (n 9) 907.
[17] Feldman (n 6) 82–83; McGoldrick (n 9) 907.
[18] See chapter 5.
[19] Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing 2010) 25. Indeed, it was referred to as a “constitutional statute” by Laws LJ in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151. Laws’ argument was that such statutes ought to be afforded some higher protection, such as a presumption against implied repeal, although it remains the case that the Human Rights Act does not enjoy any special protection against repeal by Parliament. For further discussion on constitutional statutes see, e.g., Farrah Ahmed and Adam Perry, ‘Constitutional Statutes’ (2017) 37 Oxford Journal of Legal Studies 461.

given to the courts by ss 3 and 4 of the Act respectively. “The first is an interpretive duty… which reads: ‘so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’… the second… [is] the power to issue a ‘declaration of incompatibility’”.[20] The third of these tools, located in s 19, affects the procedure of Parliament. It requires that “when introducing legislation into Parliament, a Minister must make (a) a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights… *or* (b) a statement to the effect that although he or she is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.”[21]

These three tools are now addressed in turn.[22]

8.2.1 Section 3

Section 3 of the Human Rights Act creates a rule of interpretation. It reads: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” This rule of interpretation represents a departure from the initial proposals in respect of the Act where a strike-down power for the judiciary had been

[20] Kavanagh (n 7) 1014.
[21] ibid. Emphasis in original.
[22] Not all commentators agree that these were the most significant changes brought about by the Act. For example Clayton and Tomlinson cite ss 3 and 6 (the latter dealing with the duty on public authorities to comply with the Act) as the most significant, see Clayton and Tomlinson (n 12) para 3.03. However, ss 3, 4 and 19 impacted on the way in which the courts dealt with issues of human rights most directly. Whilst s 19 has had less obvious an effect on the courts than ss 3 and 4, it had an impact on the way the courts behave with regard to legislation. As Bonner, Fenwick and Harris-Short note: “legislation will have been given the ministerial stamp of compatibility by way of the section 19 ministerial statements accompanying its introduction in each House of Parliament. As judges recognised… such statements, while not binding on them, ought to incline the courts to use their enhanced interpretative powers afforded by section 3 to strive to find a compatible interpretation.” Daniel Bonner, Helen Fenwick and Sonia Harris-Short, ‘Judicial Approaches to the Human Rights Act’ (2003) 52 International & Comparative Law Quarterly 549, 554–555. Section 2 also affects the way the courts operate as it requires that judgments of the ECtHR be taken into account; this is, however, a much less stringent requirement than that in s 3 and is thus not addressed directly here.

envisaged,[23] allowing the courts to disapply legislation which was incompatible with the rights protected by the ECHR.[24]

During the debates on the Human Rights Bill in the House of Lords, the Lord Chancellor, Lord Irving of Lairg, explained the government's view on how s 3 would operate. He indicated that "if it is possible to interpret a statute in two ways – one compatible with the Convention and one not – the courts will choose the interpretation which is compatible… however, the Bill does not allow the courts to set aside or ignore Acts of Parliament".[25] In the Commons, however, the then Home Secretary, Jack Straw, had said that the government wanted:

> …the courts to strive to find an interpretation of legislation that is consistent with Convention rights, so far as the plain words of the legislation allow, and only in the last resort to conclude that legislation is incompatible with them… I will say that it is not our intention that the courts in applying section 3 should contort the meaning of words to produce implausible or incredible meanings.[26]

Young, writing as the Act entered into force, suggested the rule of construction, imposed by the words "So far as it is possible to do so" in s 3, actually provided little or no limit to the interpretive powers of the courts:

> Section 3(1) appears to limit the powers of the court, allowing them to interpret statutes in a manner compatible with Convention rights only when it is possible to do so. However, in practice, Parliament has given the judiciary carte blanche to determine when it is impossible to interpret statutes

[23] Based on the Canadian Charter of Rights and Freedoms. Clayton and Tomlinson (n 12) para 4.01. Such an approach would have been wholly incompatible with the doctrine of parliamentary sovereignty as it is traditionally understood.
[24] The difference in approach between the ECHR and European Union law is interesting here. The House of Lords had held in *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603 that where there was an incompatibility between EU (then EEC) law and domestic law, the former must prevail. Thus, the court "disapplied" the Merchant Shipping Act 1988. This outcome has been described as "revolutionary", see HWR Wade, 'Sovereignty – Revolution or Evolution' (1996) 112 Law Quarterly Review 568. Nonetheless the different nature of the relationship between the UK and the ECHR means that there has been no equivalent in domestic human rights decisions.
[25] HL Deb 3 November 1997, vol 582, col 1230.
[26] HC Deb 3 June 1998, vol 313, cols 421-422.

> in a manner compatible with Convention rights. The express words of section 3(1) are so vague that they do not provide a clear outline of the limits of possibility.[27]

Whilst this seems to contradict the comments made by Jack Straw, Young's views are supported by the wording of the Act itself. Much has been written about s 3, particularly concerning the broad-ranging powers it afforded the judiciary.

From the outset, some commentators were concerned about the lack of guidance provided on how s 3 should operate. Marshall, writing as the Human Rights Bill was going through Parliament, noted, fairly, given the government's own conflicting comments, that s 3 was "a deeply mysterious provision posing various problems of interpretation."[28] Moreover, he pointed out that the phrase "read and given effect" in s 3:

> …may be intended to be read as meaning "interpreted", but it would seem that it must involve not merely the resolution of ambiguity in statutory provisions but also the question whether a provision of primary or secondary legislation can be treated as being compatible or incompatible with rights guaranteed in the Convention. This seems not so much a question of interpretation or construction of language but of assessment or characterisation or proper description of the relevant legislative provision when placed alongside the relevant right or rights in the Convention.[29]

Marshall was just one of the commentators who were concerned that s 3 presented significant ambiguity which might prove a challenge for the judiciary.[30]

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[27] Alison Young, 'Judicial Sovereignty and the Human Rights Act 1998' (2002) 61 Cambridge Law Journal 53, 64–65.
[28] Geoffrey Marshall, 'Interpreting Interpretation in the Human Rights Bill' [1998] Public Law 167, 167.
[29] ibid 169–170.
[30] Marshall raised more concerns in a later article, Geoffrey Marshall, 'Two Kinds of Compatibility: More about Section 3 of the Human Rights Act 1998' [1999] Public Law 377. Bennion, for example, also noted that s 3 was "likely to give courts, officials and legal advisers some headaches before the ultimate House of Lords ruling sets us all straight", Francis Bennion, 'What Interpretation Is "Possible" under Section 3(1) of the Human Rights Act 1998?' [2000] Public Law 77, 77.

Others, such as Lord Lester, who had long been an advocate of incorporation,[31] were more positive about the role the judiciary would play. He noted that the efficacy of s 3 depended "upon whether the courts will give a liberal interpretation to Convention rights and a restrictive interpretation to legislation that is in conflict with those rights."[32] Although he went on to say that the experience in other Commonwealth jurisdictions with similar approaches to protecting rights indicated:

> …a willingness to do as the Government and Parliament plainly intend; namely, to be sympathetic, imaginative, and inventive in interpreting the Human Rights Act and the law of the Convention. This means that the courts will need, where possible, to read provisions into ambiguous or incomplete legislation and to give a restrictive interpretation to provisions that are clear but sweep too broadly. The judicial interpretation of legislation under the Human Rights Act, like the politics that gave shape to the Act, will involve the art of the possible.[33]

Reviewing the Act's first year, Klug and Starmer identified four "leading cases" on the use of s 3:[34] *R v Offen and others*,[35] *Poplar Housing and Regeneration Community Association Limited v Donoghue*,[36] *R v A*,[37] and *R v Lambert*.[38] In *Poplar Housing*, Lord Woolf made it clear that interpretation, not legislation, was the court's function, but noted that "Quite where the line is to be drawn between legislating and interpreting is not clear."[39] Lord Woolf indicated that in his view the line was crossed where the courts were required to "radically alter" the legislation.[40] This threshold was clearly both very high, and somewhat subjective.

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[31] See previous chapter for a discussion of the push towards incorporation in which Lester played a prominent role.
[32] Anthony Lester, 'Interpreting Statutes under the Human Rights Act' (1999) 20 Statute Law Review 218, 225.
[33] ibid.
[34] Klug and Starmer (n 13) 656. Whilst no strict criteria are given for the use of these four cases as the leading authorities, the article is based on a survey of "all the reported cases in the higher courts since the [Human Rights Act] came into force in which the [Act] has been substantively considered" ibid 654. The authors are, thus, well placed to comment.
[35] [2001] 2 All ER 154.
[36] [2001] EWCA Civ 595, [2002] QB 48.
[37] [2001] 3 All ER 1.
[38] [2001] UKHL 37, [2002] 2 AC 545.
[39] Klug and Starmer (n 13) 657.
[40] *Poplar Housing* (n 36) para 76.

In *R v A*, Lord Steyn suggested that "In accordance with the will of Parliament as reflected in s 3 [Human Rights Act] it will sometimes be necessary to adopt an interpretation which may appear linguistically strained."[41] Again, this comment indicates the willingness of the courts to construe the powers afforded to them by s 3 broadly when reading legislation into compliance with the ECHR.

In *Lambert*, Lord Hope noted that, whilst the power in s 3 was broadly worded, it did have some limitations:

> Resort to it will not be possible if the legislation contains provisions, either in the words or phrases which are under scrutiny or elsewhere, which expressly contradict the meaning which the enactment would have to be given to make it compatible. The same consequences will follow if legislation contains provisions which have this effect by necessary implication… Section 3(1) preserves the sovereignty of Parliament. It does not give power to the judges to overturn decisions which the language of the statute shows have been taken on the very point at issue by the legislator.[42]

Perhaps the most important case which emerged in relation to s 3 is that of *Ghaidan v Godin Mendoza*.[43] Young has described this case as marking "a turning point in the interpretation of s 3(1)… Their Lordships appear to adopt a midway point between the broad view of Lord Steyn and the narrow view of Lord Hope in *R v A*".[44] The case concerned the surviving partner of a gay couple who had been in a long-term relationship and raised the question of whether or not in those circumstances the surviving partner was entitled to retain the rent of the flat under the Rent Act 1977. The House of Lords held that the requirement that a couple live together "as husband and wife", in the 1977 Act, ought to be read to mean "as *if* they were husband and wife" to ensure that the Act was compatible with the claimants' rights under the Human Rights Act.

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[41] *R v A* (n 37) 17.
[42] *Lambert* (n 38) para 79.
[43] [2004] UKHL 30, [2004] 2 AC 557.
[44] Alison L Young, 'Ghaidan v Godin-Mendoza: Avoiding the Deference Trap' [2005] Public Law 23, 23. It remains a key case on the interpretation of s 3, being regularly cited even in 2020. See, e.g., *R (Z and another) v Hackney London Borough Council* [2020] UKSC 40, [2020] 1 WLR 4327.

Young notes that the judgment illustrates that the courts would work to "continue to protect Convention rights whilst respecting the boundary between interpretation and legislation."[45] However, not all commentators have had such positive views of the impact of s 3 and the courts' response to it. Writing in 2011, Sales and Ekins note that:

> Thus far the courts have said that there is a distinction to be drawn in the application of s 3(1) of the [Human Rights Act] between interpretation (which involves a legitimate application of s 3(1) in construing a statute) and amendment or legislation by a court when giving meaning to a statute (which goes beyond what is permissible under s 3(1)).

They argue that this distinction has not been clearly articulated and that "Section 3 of the [Human Rights Act] creates new and substantial uncertainty regarding the interpretation of legislation."[46] However, given that the supposed uncertainty relates to the exercise of clearly defined rights,[47] and that there is a corpus of law explaining how the courts seek to apply s 3, it is hard to reconcile the criticism with the practice which has developed.

Moreover, whilst the power of interpretation created by s 3 is clearly broad, it does have limits. The courts cannot act as a legislature and "where reading words into legislation, the courts have stressed that the words must be consistent with the scheme and existing principle of the legislation."[48] In *Re S*,[49] the House of Lords provided a clearer articulation of the limits of s 3, saying: "a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed a boundary between interpretation and amendment."[50] If such a

[45] ibid 34.
[46] Sir Philip Sales and Richard Ekins, 'Rights-Consistent Interpretation and the Human Rights Act 1998' (2011) 127 Law Quarterly Review 217, 238.
[47] Found in the Human Rights Act itself.
[48] John Wadham and others, *Blackstone's Guide to the Human Rights Act 1998* (7th edn, Oxford University Press 2015) para 3.41.
[49] *Re S* [2002] UKHL 46, [2002] 2 AC 291.
[50] ibid [40].

boundary is likely to be crossed by the courts, the next tool provided to the judiciary by the Human Rights Act comes into play.[51]

Even with these limits, however, it is clear that s 3 of the Act provides the courts with a broad-ranging power of interpretation, of which they have made significant use. The impact of incorporation on the courts' approach to human rights is discussed in section 8.4 of this chapter.

8.2.2 Section 4

Whilst the power in s 3 allows the courts broad discretion in interpreting the meaning of a statute, it has been shown that there are limitations on how far this power can be exercised. In situations where s 3 cannot be used to remedy the wording of a statute, s 4 allows the courts to make a declaration of incompatibility.

Section 4(2) provides that "If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility." However, a declaration to this effect can only be made by the High Court and above.[52] Moreover, such "A declaration… does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and… is not binding on the parties to the proceedings in which it is made."[53] In other words, it has no legal effect on the operation of the provision which breaches the rights of the individual before the court.

Kavanagh notes that although the declaration of incompatibility may seem like a weak remedy, "it is not as weak as may at first appear for a number of reasons."[54] First, for example, if a s 4 declaration is not remedied, a claimant would be able

[51] Despite these limits, there have been some criticisms of the operation of s 3. For example, Sales and Ekins argue that s 3 "reduces the transparency of the meaning of legislation by requiring a new approach to its interpretation which in many cases departs from what would otherwise be its natural meaning, assessed by reference to traditional canons of construction." Sales and Ekins (n 46) 222.
[52] That is the High Court, Court of Appeal and Supreme Court. This is mirrored by the narrow definition of "court" adopted for the purposes of this thesis.
[53] Section 4(6). Kavanagh notes that for this reason "most litigants will prefer a [section] 3 interpretation", Kavanagh (n 7) 1024.
[54] ibid.

to apply to the ECtHR and can "argue that his or her Convention rights have been violated (as confirmed by the highest domestic courts) and that the UK government has nonetheless failed to remedy the violation."[55] Such an application is likely to lead to the UK losing its case before the ECtHR. Kavanagh frames a s 4 declaration as "a means by which the courts can alert Parliament to a binding obligation in international law."[56]

Kavanagh's second argument is that a s 4 declaration translates into political pressure on the government to rectify the breach of human rights by providing a range of actors, from the press to opposition politicians, with the chance to challenge the government.[57] Taken together, she argues that:

> All told, the political repercussions of resisting a judicial finding of a rights violation, combined with the legal repercussions in the (highly likely) event of an adverse finding from Strasbourg, set against the backdrop of the traditional comity between Parliament and the courts and the general respect for court decisions, means that a declaration of incompatibility can have a much stronger practical force than its legally non-binding status might suggest.[58]

Whilst Kavanagh argues cogently that s 4 might be more powerful than it first appears, it remains the case that, even with the implicit threat of the ECtHR ruling against the UK and the political pressure to act, Parliament is under no *obligation* to act. However, the sense that the government of the day will respect the finding of the courts echoes the comments of the Lord Chancellor during the debate on the Act in Parliament. There he said that it was expected "that the government and Parliament will in all cases almost certainly be prompted to change the law following a declaration of incompatibility."[59] This clearly indicates that it was the intention of the Government that the Human Rights Act would allow for

[55] ibid.
[56] ibid.
[57] ibid 1025.
[58] ibid.
[59] HL Deb 3 November 1997, vol 582, col 1227-1228.

declarations of incompatibility, and that this was intended to be a driver for Parliament to redress any breaches of human rights in legislation.

This expectation has been borne out. A recent report on the UK government's response to human rights judgments notes that "Since the Human Rights Act 1998 (HRA) came into force on 2 October 2000 until the end of July 2019, 42 declarations of incompatibility have been made."[60] At the time of that report it was noted that of these 42 declarations: "10 have been overturned on appeal (and there is no scope for further appeal) [and] 2 are currently subject to appeal."[61] This serves to highlight how few s 4 declarations have been made since the Act entered into force. Of the 30 declarations which had not been appealed, "5 related to provisions that had already been changed by primary legislation at the time of the declaration… 11 have been addressed by later primary or secondary legislation… 6 have been addressed by Remedial Order… 1 has been addressed by various measures… 2 the Government has notified Parliament that it is proposing to address by Remedial Order… and 5 are under consideration."[62]

As this illustrates, Kavanagh's assertion that s 4 "it is not as weak [a remedy] as may at first appear"[63] seems to have been accurate. Since 2000, successive governments have responded positively to declarations of incompatibility, remedying the breaches of individual rights which have been highlighted to them.[64] Section 4 the Human Rights Act fulfils one aspect of Gardbaum's new commonwealth model of constitutionalism, in that it "decouples judicial review from judicial supremacy by empowering the legislature to have the final word."[65]

[60] Ministry of Justice, 'Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 2018–2019' (2019) CP 182 37. 40 of these were issued prior to the cut-off in this thesis (the end of 2018) with the last being issued in March 2019. Of these 42, two do not relate to England and Wales. It is worth noting too that "there is no official database of declarations of incompatibility" and that this report contains "a summary of all declarations and the Government's response, ibid, 5". Whilst this is not the most recent report it is the final report before the cut-off date for this thesis.
[61] ibid.
[62] ibid.
[63] Kavanagh (n 7) 1024.
[64] For full discussion of these declarations and their treatment see Ministry of Justice (n 60) 37–67.
[65] Gardbaum, 'The New Commonwealth Model of Constitutionalism' (n 4) 709.

This is particularly important in the UK given the constitutional imperative that Parliament remain supreme.

One difficulty for the courts is to be found in deciding where to opt for a declaration of incompatibility rather than using their s 3 powers. Writing before the Act entered into force, Leigh and Lustgarten provided a useful outline of how they believed the courts should act when faced with a potential breach of human rights. They suggest how the courts might arrive at the conclusion that a s 4 declaration is required. They assert that:

> The task should be approached in a particular sequence:
>
> 1) A litigant claims that some legal provision, as applied against him or her by some public authority, violates a Convention right.
>
> 2) The court evaluates this use of the provision thus interpreted against the Convention, including where relevant any legitimate restriction clause…
>
> 3) If, and only if, the court determines that the provision as applied is contrary to the Convention, can it then as it were "re-read" the provision in a different manner, to see whether this may produce an interpretation consistent with the Convention.
>
> 4) If it constructs such an interpretation, it then applies that new reading to the litigant before it. Presumably in most cases the result will be a ruling in the challenger's favour.
>
> 5) If it decides that the only proper and possible interpretation creates an unavoidable conflict with the Convention, a new factor enters the equation. If the provision is a piece of subordinate legislation it can be struck down, or at any rate, be regarded as illegal as a matter of *vires*. The litigant's Convention right is thus directly vindicated.
>
> 6) If, however, the provision is a piece of primary legislation, or one (highly unusual) type of subordinate legislation, the full weight of parliamentary sovereignty falls upon the unfortunate litigant's shoulders. The sole remedy

> available is the [Declaration of Incompatibility]: a statement that the provision and the Convention right are irreconcilable. The HRA specifically provides that any [Declaration of Incompatibility] will neither affect the validity or future use of the provision, nor be binding in the case in which it is in issue – which means it is of no practical use whatever to the litigant who achieves it.[66]

This illustrates well the idea that any use of s 4 ought to be a last resort, for use after a compliant interpretation under s 3 has been attempted, rather than a point of departure for the courts under the Human Rights Act. But it also makes clear both the scope and limit of the judiciary's power to provide a remedy for breaches to an individual's rights under the Human Rights Act.

8.2.3 Section 19

The final aspect of the Human Rights Act which Kavanagh highlighted as having the most significant impact on the legal landscape is s 19. It relates to statements of compatibility. This provision changed Parliamentary process by requiring that:

> A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill… make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or… make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

Wadham et al assert that this requirement was designed "to encourage the executive to address the issue of whether proposed legislation is compatible with the Convention at the formative stage."[67] They further argue that it helps push the courts toward using their powers under s 3 rather than s 4 as the statement of compatibility "is also intended to act as evidence that a Convention-compliant interpretation is intended by Parliament".[68] However, few judgments seem to

[66] Ian Leigh and Laurence Lustgarten, 'Making Rights Real: The Courts, Remedies, and the Human Rights Act' (1999) 58 Cambridge Law Journal 509, 536–537.
[67] Wadham and others (n 48) para 3.45.
[68] ibid.

address this suggestion by drawing an evident link between the two in judicial thought. Whilst not all commentators agree that s 19 has had a significant influence on the law-making processes under the Act,[69] it can be argued that by requiring Parliament to consider issues of compatibility at the early stages of the legislative process it encourages a culture of human rights awareness.

As has been shown, the Human Rights Act made significant changes to the framework of human rights protection in England and Wales, and, indeed, the rest of the UK. It provided the courts with new ways of trying to remedy breaches of human rights through interpretation and a method of highlighting to Parliament incompatibilities between individual rights and domestic law. Moreover, the Human Rights Act created a legislative process whereby human rights were required to be considered prior to legislation being passed by Parliament, engendering a culture of greater human rights awareness amongst lawmakers. This chapter now turns to examine the impact of the Human Rights Act on the UK's performance at the ECtHR.

8.3 Has the Human Rights Act improved the UK's record at the ECtHR?

As Hickman observes, "Human rights principles have transformed public law in the United Kingdom. The transformation began well before the [Human Rights Act] but the Human Rights Act represented a shift in gear."[70] This section demonstrates that this shift in gear has led to the UK's track record at the ECtHR improving, by comparison with the increasing loses before the ECtHR illustrated in the previous chapter.

[69] Wadham et al, for example, are unconvinced that it has made any significant impact, ibid 3.46. By contrast, Lester argued that s 19 far exceeded the equivalent procedures in New Zealand and asserts that "Before the passing of the [Human Rights Act], few, if anyone, in Whitehall or Westminster appreciated *just how significant the practical impact of section 19 procedure would be upon the preparation and interpretation of proposed legislation*." Anthony Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act 1998' [2002] European Human Rights Law Review 432, 434. Emphasis added.

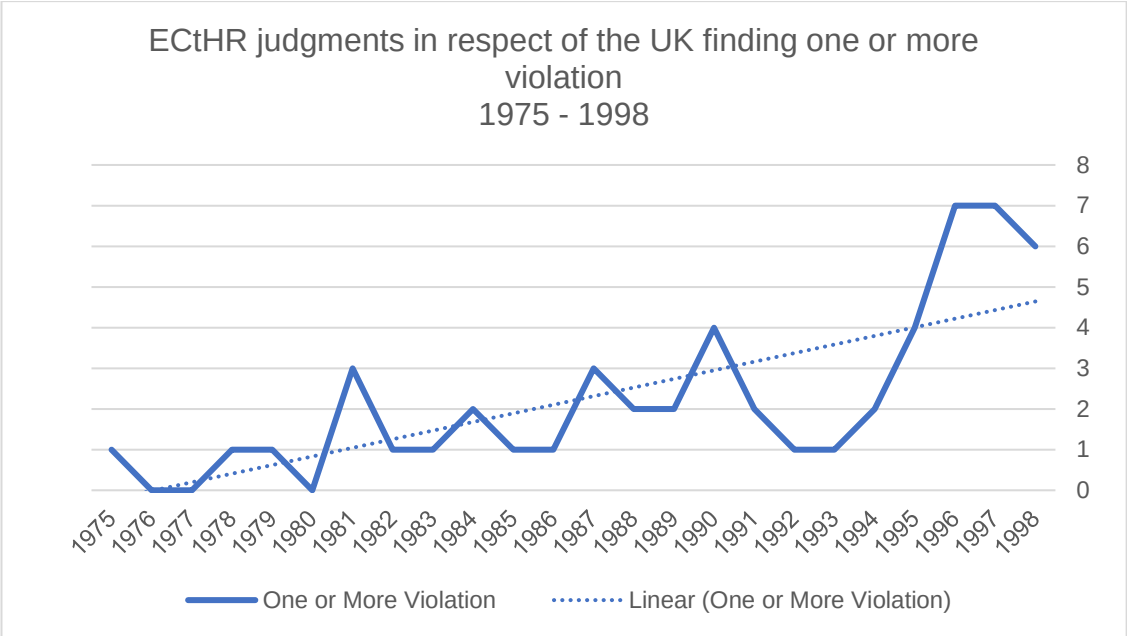
[70] Hickman (n 19) 1. The beginning of the transformation prior to the Human Rights Act is evident form the increase in judicial use of the ECHR prior to the Act, discussed in chapter 7.

The most in-depth study of UK cases before the ECtHR was carried out on behalf of the EHRC in 2012.[71] The report noted that as the "Human Rights Act… has been in force across the UK since 2000. It might be expected that – allowing for a time lag of several years as cases work through the domestic and Strasbourg systems – the Act would have resulted in fewer adverse judgments by the ECtHR against the UK."[72] This expectation has been borne out by the statistics which do show a downward trend in cases lost by the UK before the ECtHR after the Human Rights Act.

This is set against the broader backdrop, outlined in the EHRC report, that "the UK has among the lowest number of applications per year allocated for a decision. It also has a lower percentage of these applications declared admissible than most and loses proportionately fewer of the cases brought against it than most".[73] Whilst this does not directly assist in the interpretation of the impact of the Human Rights Act it is interesting that the UK is not regarded as a serial breacher of human rights, and highlights that the decrease in violations found by the ECtHR could be taken to suggest that the UK is currently amongst the more compliant members of the Council of Europe.[74]

As was illustrated in the previous chapter, in the years up to 1998, the UK was losing an increasing number of cases before the ECtHR, as the table below shows.[75]

[71] Alice Donald, Jane Gordon and Philip Leach, *Research Report 83: The UK and the European Court of Human Rights* (Equality and Human Rights Commission 2012).
[72] ibid 36. The time lag accepted in the report is about five years, a number suggested by Amos. See, Merris Amos, 'Dialogue with Strasbourg' (Tenth Anniversary of the Human Rights Act Symposium, Durham Human Rights Centre Conference, 24 September 2010).
[73] Donald, Gordon and Leach (n 71) 42.
[74] It also serves to show that claims from politicians and certain sections of the press that the UK loses cases before the ECtHR frequently are incorrect. This point is addressed directly in Donald, Gordon and Leach (n 71).
[75] Figures taken from the ECtHR's statistics (<https://www.echr.coe.int/Pages/home.aspx?p=reports&c=> accessed 18 December 2020) and ibid.

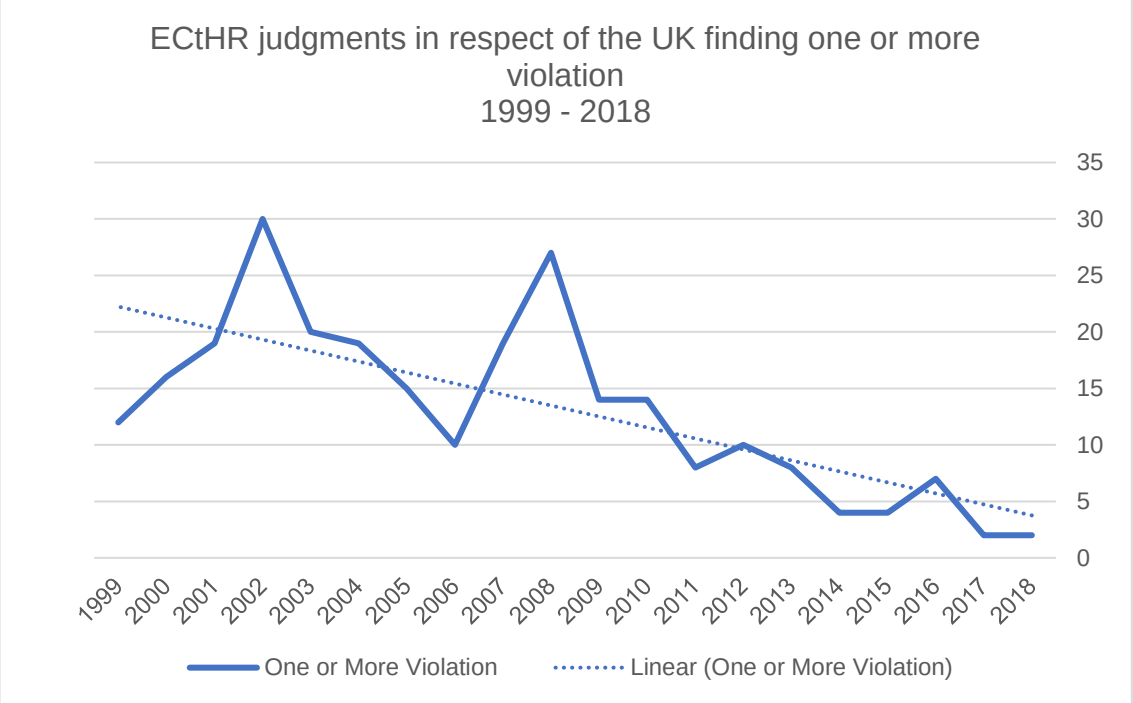


By contrast, after an initial spike in cases as the remaining pre-Human Rights Act challenges to the UK at the ECtHR were heard, there has been a consistent downward trend in judgments against the UK by the court finding one or more violation. Although it should be noted that the average number of violations per year in the years after 1998 is much higher than those before, there are a number of reasons why this is likely to be the case. For example, the court has increasingly struggled with workload as the number of applications across all states parties has significantly increased.[76] As Donald, Gordon and Leach note: "Figures may… fluctuate according to the productivity of the Court in processing cases and producing judgments (an effect that is likely to become more pronounced from 2011 onwards as the impact of Protocol 14 is felt)."[77] Similarly, it is likely that the number of judgments finding violation would be higher as claimants (and their legal advisors) became more aware of their rights at the domestic level. Additionally, certainly early on, it might be expected that there would be an increase in violations as the courts at the domestic level sought to

[76] Indeed, the ECtHR's own analysis shows that between 1998 and 2013 the number of applications allocated to a judicial formation increased from 6,000 (1998) to 65,800 (2013), and that although the number of allocated applications has dropped sharply following reforms it was 43,100 in 2018. These figures are taken from the ECtHR's own statistical analysis documents which can be found here: <https://www.echr.coe.int/sites/search_eng/pages/search.aspx#{%22sort%22:[%22createdAsDate%20Descending%22],%22Title%22:[%22\%22analysis%20of%20statistics\%22%22],%22contentlanguage%22:[%22ENG%22]}> accessed 18 December 2020.
[77] Donald, Gordon and Leach (n 71) 34. The ECtHR's application process is discussed in more detail in chapter 4.

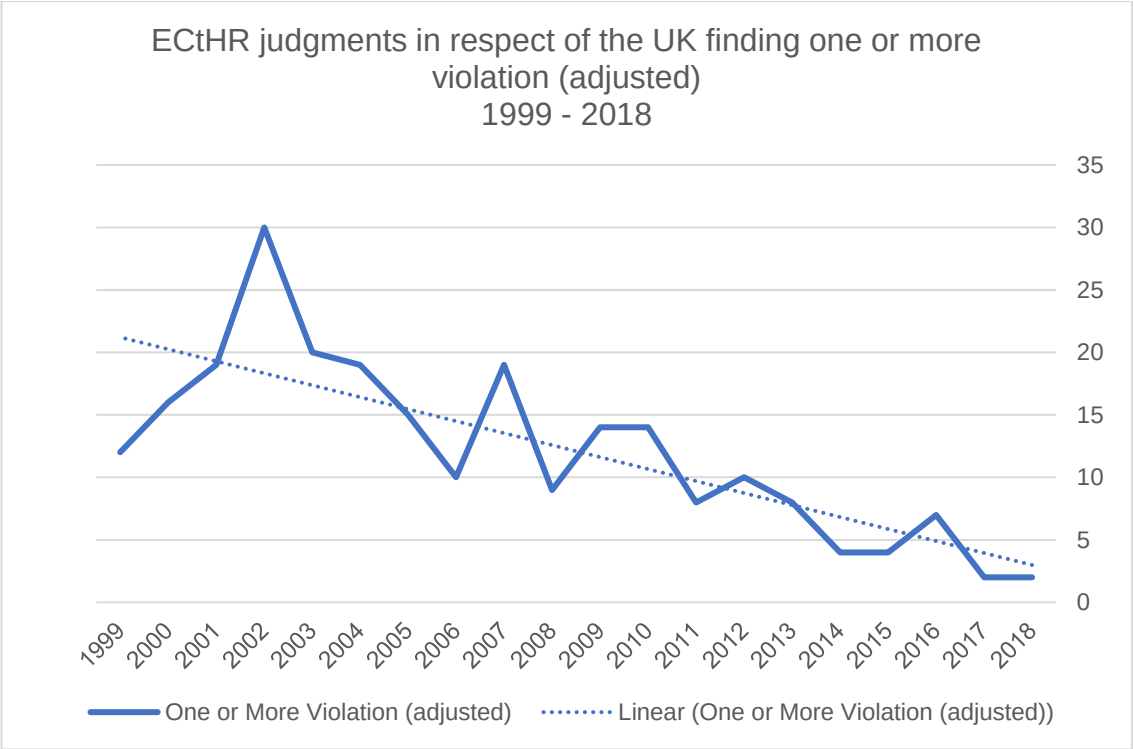
calibrate their decision-making using the new powers afforded them with the decision-making of the ECtHR to a greater or lesser degree of success.

Nonetheless, as the tables below show, the reduction of judgments against the UK by the ECtHR began prior to 2011, and appears to have been relatively consistent since well before then.[78]



Whilst these figures show a second large spike in findings of at least one violation in 2008, this can be adjusted out as it reflected the fact that in that year "The ECtHR found a breach of Article 14 for discriminatory benefits provisions for widows in 19 cases".[79] Where these 19 identical cases are counted as one, as they relate to the same breach of Article 14, the downward trend is even clearer, as the table below shows.

[78] Figures taken from the ECtHR's statistics (<https://www.echr.coe.int/Pages/home.aspx?p=reports&c=> accessed 18 December 2020) and Donald, Gordon and Leach (n 71).
[79] ibid 33.



As noted above, a number of factors must be taken into consideration when examining these trends, including the changes to the way in which the ECtHR operated over time. Particularly as these changes were often aimed at reducing the number of cases to be heard by the ECtHR, so as to ameliorate the backlog of cases.[80] Thus, "the Convention system significantly changed when Protocol 11 entered into force in 1998, abolishing the European Commission on Human Rights and establishing a fulltime court. Protocol 14 to the ECHR [entered into force in 2010 and] brought some other major changes, introducing, inter alia, the single judge formation and the significant disadvantage admissibility criterion".[81] These more stringent screening measures mean that where a case comes before the ECtHR there is a greater likelihood that violation will be found because higher threshold tests will need to be met in order for a case to be heard by a judicial formation of the ECtHR.

[80] For a summary of the changes which have taken place in respect of the functioning of the ECHR and ECtHR see, e.g., Lize R Glas, 'From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?' (2020) 20 Human Rights Law Review 121; L Caflisch, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' (2006) 6 Human Rights Law Review 403.
[81] Glas (n 80) 122.

Thus, whilst this exercise is, to some extent, a blunt instrument for understanding the impact of the Human Rights Act, it appears to illustrate clearly that the UK's track record at the ECtHR has improved in the years since the Human Rights Act entered into force. Writing in 2012, Donald, Gordon and Leach noted that:

> The Human Rights Act (HRA) has been in force across the UK since 2000. It might be expected that – allowing for a time lag of several years as cases work through the domestic and Strasbourg systems – the Act would have resulted in fewer adverse judgments by the ECtHR against the UK. This expectation reflects the fact that, as a result of the HRA, UK courts consider human rights more explicitly and intensively than before and that the Strasbourg Court would, in turn, follow their reasoning and conclusions… The number of adverse judgments against the UK has indeed shown a slight downward trend since 2005… A more marked and consistent reduction in adverse judgments may become apparent in future years…[82]

This prediction seems to have been fulfilled, as the tables above show. However, their caveat, that the low numbers of judgments against the UK mean that discerning clear statistical trends will be challenging, remains true.[83] Nonetheless, it appears to be the case that the incorporation of the ECHR into the domestic law of the UK by way of the Human Rights Act has improved the UK's track record at the ECtHR over the past two decades. This is all the more interesting as it might reasonably be expected that the increased culture of human rights awareness amongst applicants and their legal advisors, ushered in by the Human Rights Act, would lead to a greater number of challenges on human rights grounds. Rather, this suggests that, even if this is the case, the domestic courts are able to provide an effective forum for raising and resolving breaches of human rights.

[82] Donald, Gordon and Leach (n 71) 36.
[83] ibid.

8.4 How has Incorporation Changed the Courts' Approach to Human Rights in England and Wales?

The Human Rights Act altered completely the way in which judges deal with issues of human rights that come before them. It put on statutory footing new methods of addressing issues of human rights adjudication and the courts appear to have embraced these powers. Thus, as has been shown, s 3 has been used widely by the courts to ensure that, where possible, the interpretation of a statute under scrutiny in court is rights compliant. The strong interpretive power granted by s 3 has clearly had a significant impact on the courts' willingness to interpret statute increasingly broadly. It has arguably brought about the biggest shift in approach by the courts in cases related to human rights.

Prior to the Human Rights Act the courts were willing to use unincorporated human rights treaties in certain circumstances, such as the interpretation of statutes where there was ambiguity.[84] Such an approach was a long-accepted tenet of the law of England and Wales. As previously highlighted, the court noted in the case of *Salomon*:

> …there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specified treaty obligations; and if one of the meanings that can reasonably be attributed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is so consonant is to be preferred.[85]

However, whilst such comments clearly legitimised the use by courts of unincorporated treaties, the House of Lords stated in *R v Secretary of State for the Home Department ex, p Brind* that this principle was "a mere canon of construction which involves no importation of international law into the domestic field".[86] It was also used without consistency between individual judges and courts. The creation by s 3 of an obligation on the courts to ensure "So far as it is

[84] See chapter 7.
[85] *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143, per Diplock LJ.
[86] [1991] 1 AC 696, 748.

possible to do so" that their interpretation of "primary legislation and subordinate legislation must be… compatible with the Convention rights",[87] radically altered this approach. It was a move from an optional power, predicated on the finding of some uncertainty in legislation, which could be interpreted by reference to an unincorporated treaty, to a positive obligation upon the courts to ensure that their interpretation of statute is ECHR compliant.

Interestingly, Kavanagh suggests that although the powers granted by s 3 seem radical "the difference post-HRA lies more in the judiciary's willingness to use existing (creative) techniques of statutory interpretation and in their sense of legitimacy in doing so".[88] In other words, these powers already existed, to some extent, but the courts have been emboldened and legitimised in their use of interpretive powers by the Act. This seems to be fair comment, but it remains the case that the transfer from the optional power to refer to unincorporated treaties, as outlined in *Salomon*, to an obligation on the courts to interpret legislation in a rights compliant manner where possible represented a huge shift in approach. That the Human Rights Act put the judiciary very much in control of the application of human rights was also asserted by Young, who noted that "Control over the extent to which Convention rights are protected through statutory interpretation rests firmly in the hands of the judiciary."[89]

Section 4 has had a less dramatic impact on the courts' approach to human rights than s 3 as it allows them to flag their concerns with Parliament, rather than allowing them directly to remedy the breach themselves. Some commentators, such as Wilson Stark, have argued that the courts have not made enough use of the power to make declarations of incompatibility. Indeed, she says that "the traditional judicial approach to s 4 is unsatisfactory and unduly deferential to the

[87] Indeed, the courts have characterised this obligation as "a very strong and far reaching", *Attorney General's Reference (No 4 of 2002)* 2004 UKHL 43, [2005] 1 AC 264, [28] per Lord Bingham.
[88] Aileen Kavanagh, 'Choosing between Sections 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after Ghaidan v Mendoza' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial reasoning under the UK Human Rights Act* (Cambridge University Press 2007) 141.
[89] Young (n 27) 53.

executive."[90] Although she notes that this is at odds with the fact "that the courts have used s 3 more liberally, whilst holding back on s 4, when s 3 is the greater (and more insidious) threat to sovereignty."[91] Wilson Stark is not alone in these views. Writing as early as 2003, Klug, discussing cases where the courts had not been willing to issue a s 4 declaration,[92] asserted that "To give proper effect to the dialogue model requires a rehabilitation of s 4. It requires judges to have the confidence to issue a declaration of incompatibility whenever it is 'not possible' to apply s 3 and where they deem legislation – *any* legislation – to be incompatible with Convention rights."[93] The courts themselves have noted that they believe a declaration under s 4 should operate as "a measure of last resort",[94] rendering their reticence to make such declarations, except where absolutely necessary, less surprising.

Thus, while the courts have embraced fully their powers of statutory interpretation under s 3 of the Human Rights Act, they have concentrated much less on developing the use of s 4 declarations. Wilson Stark also posits that "It may also be that s 3 has been more warmly embraced by the courts because it is seen by them as simply an extension of their existing powers of interpretation – it is not 'radically new'. Section 4, on the other hand, is a much more alien power to come to terms with."[95] This conclusion fits well against the backdrop, discussed in the previous chapter, of the courts' increasing willingness to make use of the ECHR as a tool for interpretation. Importantly, the use of s 3 allows the courts to try to remedy a perceived breach of ECHR rights in a way which was not fully consistent

[90] Shona Wilson Stark, 'Facing Facts: Judicial Approaches to Section 4 of the Human Rights Act 1998' (2017) 133 Law Quarterly Review 631, 631. Although Wilson Stark also acknowledges that such a declaration must actively be sought by the claimant so that it is not solely the at the discretion of the court to make such a declaration, see ibid 632.
[91] Wilson Stark (n 90) 654. A similar view had previously been expressed early on after the Act entered into force by Lord Lester. He noted that "It is interesting to consider which involves the greater inroad upon parliamentary sovereignty, a power to strike down inconsistent legislation, or a duty to adopt a strained (though not an absurd or fanciful) reading." Lord Lester, 'Developing Constitutional Principles of Public Law' [2001] Public Law 684, 691.
[92] She cites *R (on the application of Pearson) v Secretary of State for the Home Department* [2001] EWHC Admin 239, [2001] HRLR 39 as one such example.
[93] Francesca Klug, 'Judicial Deference under the Human Rights Act 1998' [2003] European Human Rights Law Review 125, 131 emphasis in original.
[94] *R v A* (No 2) [2001] UKHL 25, [2002] 1 AC 45, para [44] per Lord Steyn.
[95] Wilson Stark (n 90) 654.

and developed prior to the introduction of the Human Rights Act, and which now has a basis in statute, serving to add greater legitimacy.

The Human Rights Act has, however, led to some suggesting that the judiciary has become more activist in its endeavours. As Tugendahdt notes: "Judicial activism has become a central issue in the debate on whether the Human Rights Act 1998… should be amended or replaced by a British Bill of Rights".[96] Indeed, there has been significant criticism of the way in which the Human Rights Act has changed the way the judiciary operates, with some commentators arguing that is has given judges too much power and politicised them. Gearty argues that, in some quarters, the ECHR and the Human Rights Act are viewed as "another example of foreign intrusion… an alien contamination that needs now to be washed away altogether so that the UK's fresh start can be properly made."[97] The current Attorney General, Suella Braverman attacked the Human Rights Act as the source of a perceived increase in judicial power. She noted that "traditionally, Parliament made the law and judges applied it", but "today, our courts exercise a form of political power… even the most intricate relations between the state and individual can be questioned by judges."[98] She laid the blame for this state of affairs at the door of the Human Rights Act and the "prolific human rights industry which it has spawned" and through which "the concept of 'fundamental' human rights has been stretched beyond recognition."[99] Moreover, such criticism is not new and represents the latest in a string of attacks on the Human Rights Act by politicians which have resulted in proposals variously to repeal or to "update" the Act.[100]

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[96] Michael Tugendhat, 'Privacy, Judicial Activism and Democracy' (2018) 23 Communications Law 63, 63.

[97] Conor Gearty, *On Fantasy Island: Britain, Strasbourg, and Human Rights* (Oxford University Press 2016) xiii.

[98] Suella Braverman, 'People We Elect Must Take Back Control from People We Don't. Who Include the Judges.' (*Conservative Home*, 27 January 2020) <https://www.conservativehome.com/platform/2020/01/suella-braverman-people-we-elect-must-take-back-control-from-people-we-dont-who-include-the-judges.html> accessed 18 December 2020.

[99] ibid.

[100] For discussion on the increasing attacks on the Human Rights Act see, e.g., Jacques Hartmann and Samuel White, 'The Alleged Backlash against Human Rights: Evidence from Denmark and the UK' in Kasey McCall Smith, Andrea Birdsall and Elisenda Casanas Adam (eds), *Human Rights in Times of Transition: Liberal Democracy and Challenges of National Security* (Edward Elgar 2020). Proposals from the Conservative Party to repeal the Human Rights Act have currently been shelved and the most resent manifesto promises to "update" the Act, but no

Nonetheless, such criticism has not prevented the judiciary engaging fully with the new status quo following the Human Rights Act. It seems fair to suggest that judges have been emboldened by the elevation of the rule of interpretation to a statutory obligation and have made wide use of this power to promote human rights compliance. Similarly, the power to make declarations of incompatibility has provided the judiciary with a method of raising concerns with Parliament, which although sparingly used, seems to be a reasonably effective system of promoting rights compliance. In short, the Act appears to have enabled the judiciary to provide a more systematic and effective way of ensuring that human rights violations can be addressed quickly and meaningfully.

8.5 ICCPR in the Courts of England and Wales since the Human Rights Act 1998

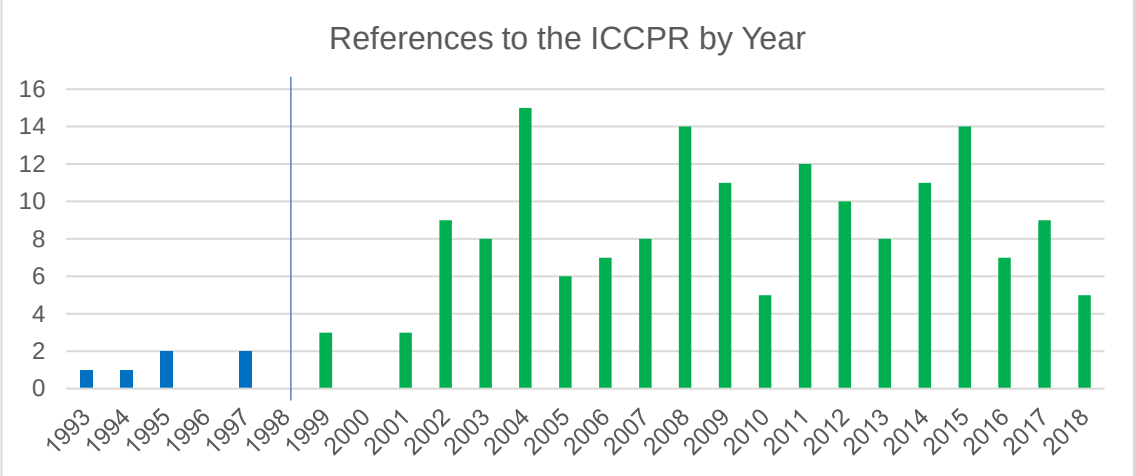
Whilst the Human Rights Act has, unsurprisingly, had an immense impact on the use of the ECHR within the courts of England and Wales, the gap between the use of the ICCPR and ECHR has widened still further during this period. As chapter 7 illustrated, the period between 1976, when the ICCPR entered into force, and 1998 saw limited judicial use of the ICCPR in England and Wales. Indeed, "In 1984, the United Kingdom Government's representative to the UN Human Rights Committee was unable to identify even one case in which the British Courts had made reference to the Covenant."[101] This serves to highlight the extent to which the ICCPR remained extrinsic to the domestic courts' reasoning on human rights. By 1998 the courts in England and Wales had only made reference to the ICCPR in six cases and had not engaged in discussing the content of the ICCPR in any depth in any of them.[102]

indication is given of how this update is likely to change the status quo, see Conservative Party, 'The Conservative and Unionist Party Manifesto 2019' (2019) <https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf> accessed 18 December 2020.

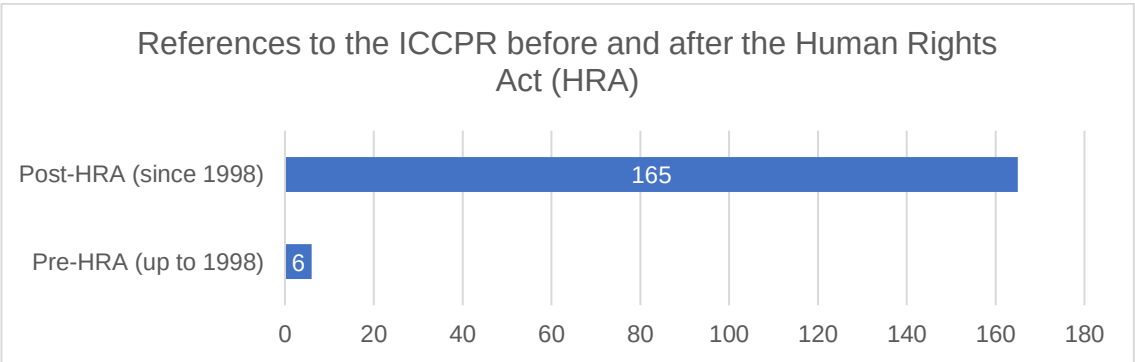
[101] Clayton and Tomlinson (n 12) para 2.56.

[102] See chapter 7, particularly section 7.4.

Despite this inauspicious start, the period from 1998 onwards saw a marked increase in the use of the ICCPR by the English and Welsh courts, as the graph below illustrates.[103]



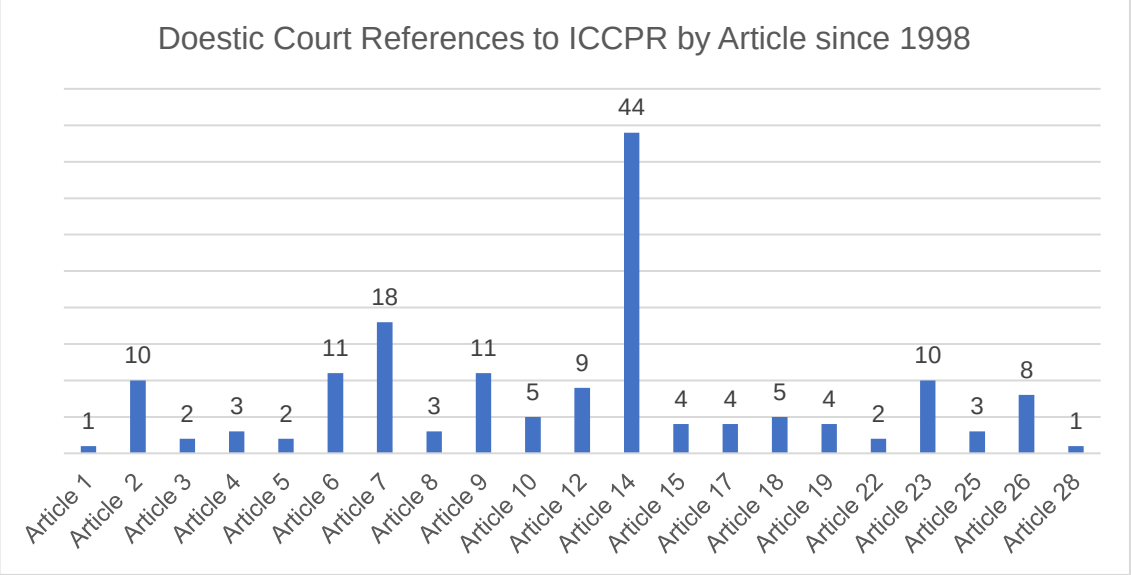
Although there is a lag between the passage of the Human Rights Act in 1998 and its entry into force in 2000, there follows a significant increase in the number of references being made to the ICCPR by courts in England and Wales.[104] However, the increase is sporadic, showing no trend of continuous growth of reference, or consistently high number of references by the courts. Nevertheless, as the chart below shows, there was an almost thirty-fold increase in the number of judgments which made reference to the ICCPR post-Human Rights Act: an enormous increase.



[103] This data is drawn from the survey of cases mentioning the ICCPR outlined in the methodology chapter of this thesis (chapter 3). A full list of these cases can be found in the appendix to this thesis.

[104] This lag is to be expected as it takes some time for cases to filter up to the higher courts, see, e.g., Amos' comments in relation to the ECHR Amos (n 72).

Examining these 165 cases demonstrates a number of trends in the way in which the ICCPR has been used by the courts. For example, it is clear that some parts of the ICCPR are used much more widely by the courts as a point of reference than others, as the table below, outlining the number of references organised by article, shows.[105]



It is hardly surprising that of the references made by courts to the ICCPR the majority relate to Article 14. The Article includes *inter alia* an obligation to provide compensation for victims of a miscarriage of justice. This protection is the only part of the ICCPR to have been incorporated into domestic law, by way of s 133 of the Criminal Justice Act 1988.[106] This illustrates clearly the apparent positive link between incorporation and frequency of reference by the courts. It also renders these cases less helpful in the context of understanding how the courts are willing to make use of unincorporated treaties.[107]

[105] Note, that the total number of references to specific provisions of the ICCPR differs from the number of cases referencing the ICCPR. This is due to the fact that some cases make references to multiple provisions within one judgment. Likewise, some cases do not make specific reference to any provision of the ICCPR rather to the treaty as a whole.

[106] Specifically, this is Article 14(6). For discussion of the protections offered by s 133 and the development of the law in this area see, e.g., Carolyn Hoyle and Laura Tilt, 'Not Innocent Enough: State Compensation for Miscarriages of Justice in England and Wales' [2020] Criminal Law Review 29.

[107] In fact, the vast majority of references to the ICCPR in these cases are simply to note that s 133 acts to incorporate part of Article 14.

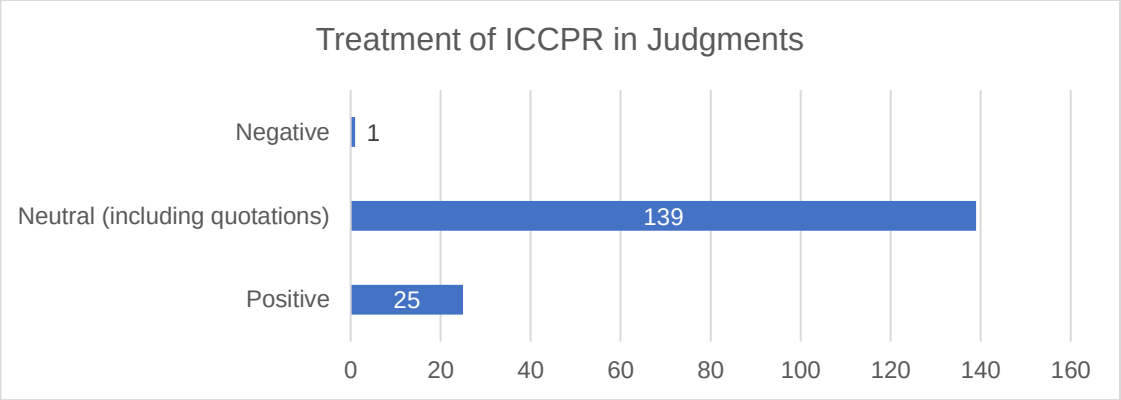
It is interesting to note that the next most widely referred to provision is Article 7, the prohibition of torture, inhuman and degrading treatment. The use of Article 7 by the courts serves as a useful illustration of the general trends of use of the ICCPR more broadly. Many of these cases relate to issues of deportation and asylum concerning countries which are not part of the ECHR system.[108] In only three of these cases was the ICCPR used as even a very small part of the judicial decision-making process. The first of these is *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex p Pinochet Ugarte (No 3)*.[109] Here, Lord Millet references the protections offered by Article 7 in order to outline the law in relation to torture,[110] however the unique circumstances of this case (i.e. a request to extradite a former head of state) mean that the use of the ICCPR in this instance does little to further the cause of the ICCPR in domestic law. The second case, *K v Secretary of State for the Home Department*,[111] related to whether the applicant was in fact a refugee as a matter of law. The reference to Article 7 was, once again, in the context of a discussion of the general international law provisions in relation to the prohibition on torture.[112] Thus, in neither of these cases was the use of Article 7 central to the outcome reached by the court.

In the third case, the Court of Appeal made greater use of the ICCPR. The case, *BE (Iran) v Secretary of State for the Home Department*,[113] related to a claim for asylum by an Iranian soldier who had deserted in order to avoid laying land mines on roads used by civilians. The court accepted the submissions of BE's counsel that the ICCPR's protections apply in the case at hand, using it to grant the applicant's asylum claim.[114] However, a major reason for the decision to accept the ICCPR as the basis of a decision in relation to BE's human rights was that

[108] In these cases, the country requesting extradition is usually a party to the ICCPR and the courts make reference to the ICCPR because of this. It is, of course, worth noting that the ECHR can be relied upon to prevent extradition to a country which is not party to the ECHR, see, e.g., *Othman (Abu Qatada) v United Kingdom* (App No 8139/09) Judgment of 5 May 2012.
[109] [2000] 1 AC 147.
[110] ibid 274.
[111] [2006] UKHL 46, [2007] 1 AC 412.
[112] ibid [94] per Baroness Hale. Although the House of Lords in this case made greater use of Article 23 of the ICCPR in relation to the legal definition of family, ibid [45].
[113] [2008] EWCA Civ 540, [2009] INLR 1.
[114] ibid paras [33]-[35].

Iran was party to the ICCPR, rather than the UK's own relationship with the treaty.[115] Thus, in the cases in which it *is* used, which are a minority, the courts' use of the ICCPR is not central to their decision-making process or fundamental to judicial reasoning. In the remainder of the 18 cases where the courts made use of the ICCPR, the reference is either neutral (i.e. a passing reference without discussion of the merits of the ICCPR as a source of law at the domestic level) or simply as part of a quote which is not then developed in the text of the judgment itself.

This trend, whereby the majority of references are neutral, is illustrated clearly by reference to the 165 cases citing the ICCPR more broadly, too, as the chart below illustrates.



There were 25 positive references to the ICCPR, where the courts made use of, or engaged with, the ICCPR itself as part of their decision-making process. The majority of these cases relate to asylum decisions,[116] or involved some in-depth discussion of the intention of the legislators when drafting s 133 of the Criminal

[115] ibid.

[116] Such as, for example, *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856. This was an asylum appeal by a Kurdish national who argued that he would be forced into military service if repatriated to Turkey, his appeal was dismissed. Here, the court used the ICCPR as a means of interpretation alongside the ECHR ([10]) and referenced a decision by the HRC ([48]).

Justice Act,[117] or involved facts centred outside the UK.[118] Thus, even where the courts of England and Wales engage positively with the ICCPR (i.e. seek to apply the provisions of the ICCPR with a degree of approval) it is often related to a second country's membership of the ICCPR or related to the small part of the ICCPR which has been incorporated into domestic law. There is no evidence of the same kind of development of jurisprudence specific to the ICCPR as was developed in relation to the ECHR prior to incorporation.[119]

During the period following the Human Rights Act the courts of England and Wales made increasing reference to the ICCPR. However, almost a third of these references relate to a single provision (Article 14) which has been incorporated into domestic law, and the vast majority of the 165 cases (that is, 139) simply make neutral, passing reference to the ICCPR (i.e. they do not seek to rely on the provisions of the ICCPR, rather they acknowledge that it exists but move on without applying it).[120] The increase in references in judgments may well arise because of the increased awareness of human rights within England and Wales arising from the Human Rights Act and the culture of human rights it created. But, as this section has illustrated, the ICCPR has not developed as a protection of individual rights for those in England and Wales in the way the ECHR did prior to incorporation, and remains largely unusable to those in England and Wales seeking to enforce their rights.

[117] See, e.g., *R (on the application of Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48. This case related to a claim for compensation following a miscarriage of justice and raised the question of whether the phrase a "new or newly discovered fact" under s 133(1) of the Criminal Justice Act 1988 meant a fact unknown by the convicted person during the trial process or an appeal. The Court engaged significantly with the ICCPR, looking at *inter alia* the travaux préparatoires ([18] *et seq*), in order to read s 133 consistently with the ICCPR and the drafters' intentions. The appeal was allowed.

[118] Such as *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76. This case related to a UK national detained by the United States at Guantanamo Bay, the Secretary of State's application for judicial review was dismissed. The Court asserted that "Of the many source documents to which we have been referred, it is enough to cite the International Covenant of [sic] Civil and Political Rights, to which the United Kingdom and the United States are parties" before going on to discuss the application of the ICCPR to the case ([63] *et seq*).

[119] As discussed in chapter 7.

[120] A phenomenon also noted by Clayton and Tomlinson, albeit fairly early on after the Human Rights Act, see Clayton and Tomlinson (n 12) para 2.58.

8.6 The UK and the ICCPR after the Human Rights Act

As has been shown, the courts' approach to the ICCPR has developed, to an extent, in the period since the Human Rights Act entered into force. It has not, however, become a central part of human rights adjudication in the way the ECHR did prior to the Human Rights Act. In order to assess the impact of the Human Rights Act on the UK's compliance with the ICCPR, this section addresses the periodic reporting by the UK and the comments of the HRC in relation to this to assess whether incorporation of the ECHR led to better human rights protection under the ICCPR.[121]

Examining the HRC's concluding observations highlighting concerns and queries following the sixth periodic report submitted by the UK in 2008 (ten years after the passage of the Human Rights Act), it is clear that the HRC believed there to be a number of issues of concern. Of particular interest was the fact that the HRC noted:

> …that the Covenant is not directly applicable in the State party. In this regard, it recalls that several Covenant rights are not included among the provisions of the European Convention on Human Rights which has been incorporated into the domestic legal order through the Human Rights Act 1998.[122]

More tellingly still, the HRC followed this observation with a call on the UK to "make efforts to ensure that judges are familiar with the provisions of the Covenant."[123] These observations taken together suggest strongly that the HRC took the view that the protections provided for by the ICCPR had not fully been realised by the UK at a domestic level, despite its international obligations under the treaty. Indeed, the HRC noted 23 separate issues for concern in relation to

[121] Periodic reporting is discussed in chapter 4.
[122] UN Human Rights Committee 'Concluding observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc CCPR/C/GBR/CO/6, para 6. See also chapter 4 for a discussion of the differences between the protection offered by the two instruments.
[123] ibid.

the UK's compliance with the ICCPR.[124] These included areas such as the detention without charge of terror suspects for extended periods of time under the Terrorism Act 2006,[125] the control order regime in place under the Prevention of Terrorism Act 2005,[126] and delayed access to lawyers for those detained under the Terrorism Act 2000.[127] These concerns, and the others listed, highlight a range of areas where it would not be possible for someone in the UK to secure their rights under the ICCPR.[128]

Again in 2015, during the seventh periodic reporting cycle, the HRC raised concerns about the UK's compliance with its obligations under the ICCPR. Indeed, in its concluding observations the HRC elaborated further its concerns about the lack of applicability of the ICCPR in the UK:

> The Committee notes that the Covenant is not directly applicable in the State party and… recalls that several Covenant rights are not covered by the Human Rights Act 1998. It is also concerned about… the lack of a comprehensive mechanism for reviewing existing gaps and inconsistencies between the domestic human rights legal framework and the rights as set forth in the Covenant.[129]

The HRC also noted the link between the Human Rights Act and protection of those rights which are protected in both the ICCPR and ECHR noting that:

> Finally, the Committee is concerned about a reported plan to repeal the Human Rights Act 1998 and to replace it with a new Bill of Rights for the United Kingdom of Great Britain and Northern Ireland, and that such a

[124] This includes specific sections directed at the situation in Northern Ireland (e.g., ibid para 18) and in relation to the British Overseas Territories (e.g., ibid para 13). However, the majority apply *inter alia* to England and Wales.
[125] ibid para 15.
[126] ibid para 16.
[127] ibid para 19.
[128] It is worth highlighting that there is no equivalent process to Periodic Review under the ECHR system, thus there is no broad compliance review carried out to analyse whether UK legislation is compliant with the ECHR.
[129] UN Human Rights Committee 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (17 August 2015) UN Doc CCPR/C/GBR/CO/7, para 5.

development will weaken the degree of protection afforded to the rights enshrined in the Covenant, within the domestic legal order.[130]

The long list of other concerns in these concluding observations also suggests that although the range of issues had changed somewhat from those of the previous reporting cycle, there remained serious concerns on the part of the HRC about the UK's general level of compliance with its treaty obligations. Thus, for example, the HRC again raised concerns about counter-terrorism powers under the Terrorism Act 2000,[131] the power to deprive persons of citizenship and potentially rendering those persons stateless,[132] and the use of closed material procedures under the Justice and Security Act 2013 in civil cases where issues of national security are raised.[133]

These two sets of concluding observations serve to highlight the range of issues of concern to the HRC with respect of the UK's compliance with the ICCPR, and illustrate that the Human Rights Act does not prevent the UK being in breach of its obligations under the ICCPR. It is clear from the HRC's observations that it believes that the current framework of legal protection for human rights is not sufficient to protect all those rights guaranteed under the ICCPR. Thus, despite the increasing number of references to the ICCPR by UK courts and the incorporation of the ECHR, the protection of the rights contained in ICCPR has not advanced significantly in the UK since the Human Rights Act, nor, indeed, since the ICCPR entered into force.

8.7 Conclusion

The Human Rights Act brought about the biggest change seen yet in the domestic protection of human rights in England and Wales, and, indeed, the whole of the UK. Following the decades-long debate on the incorporation of international human rights instruments in the UK which had been witnessed prior to 1998, the

[130] ibid.
[131] ibid para 14. Including again the length of time during which suspects can be held without charge, and the denial of bail for those arrested under the 2000 Act.
[132] ibid para 15.
[133] ibid para 22.

Human Rights Act provided those in all of the UK with a method of enforcing their rights under the ECHR in the domestic courts.

The Act itself had to navigate the competing priorities of ensuring that human rights were protected and enforceable with the need to respect the UK's constitutional framework and the doctrine of parliamentary sovereignty. The way in which the Human Rights Act balanced these priorities seems to have been effective inasmuch as it has allowed the courts to operate to protect human rights where possible and given the courts a method of highlighting issues with legislation to Parliament. Thus, s 3 of the Act requires the courts to use their interpretative powers to try and seek rights compliance, a power judges have embraced and used. Likewise, s 4 operates to provide a way of highlighting to Parliament that such an interpretation is not possible and to allow them to remedy the situation, whilst the courts have been less frequent in their use of this power they have made use of it and it has been relatively effective. From the perspective of Parliament, the Act requires, by way of s 19, that the human rights considerations of legislation are addressed before it has left Parliament, encouraging an increased awareness of the human rights implications amongst parliamentarians. Whilst it is the case that these tools do seem to have allowed the courts to act more consistently and proactively to protect human rights, they have also resulted in criticism. Increasingly, arguments are being made in some quarters that s 3 in particular has politicised judicial decision-making and emboldened judges to read legislation in ways not explicitly sanctioned by Parliament, or to reframe issues as legal rather than political.[134] Such arguments, however, seem to ignore the improvement in human rights protection ushered in by the Act. These arguments also appear to ignore that the transfer of interpretive

[134] See, e.g., Richard Ekins, *Protecting the Constitution: How and Why Parliament Should Limit Judicial Power* (Policy Exchange 2019). Here Ekins suggests the overhaul of s 3 of the Human Rights Act to "help restore the stability of the statute book and avoid litigation being a means to unsettle the legal meaning and effect of legislation." ibid 24. Similarly, he argues for the reform of s 4 saying "The [Human Rights Act] might also be amended to make clear… that a judicial declaration of incompatibility… does not require, de facto, amendment of the law in question… Whether legislation ought to be amended or repealed must remain a question for Parliament itself freely to decide." ibid. Although this comment ignores that fact that Parliamentary action following a s 4 declaration has *always* been at the discretion of Parliament. For examples of such criticism see also more generally the outputs of the "Judicial Power Project" here: <https:// judicialpowerproject.org.uk/> accessed 18 December 2020.

powers to the judiciary seems to have been envisaged by the government of the day.[135]

The courts have embraced these powers and have widely used s 3 to ensure rights compliant interpretations are adopted, in the words of the statute, "So far as it is possible to do so". As the court did in *Ghaidan v Godin Mendoza*,[136] holding that the words "as husband and wife" ought to be read to mean "as *if* they were husband and wife" in order to achieve rights compliance.[137] Similarly, the courts have made use of the power under s 4 to make a declaration of incompatibility. The Lord Chancellor's view during the passage of the Human Rights Bill was that he expected "that the government and Parliament will in all cases almost certainly be prompted to change the law following a declaration of incompatibility."[138] That hope appears to have been borne out by the fact that the majority of declarations have been met with a change in the law to achieve rights compliance, albeit not always very rapidly.[139]

That the Human Rights Act has improved the ability of those in the UK as a whole, not just England and Wales, to enforce their rights in court more effectively seems also to have been confirmed by the fact that since 1998 there has been a decline in the number of judgments of the ECtHR finding violations by the UK. Although this is a blunt instrument by which to assess the impact of the Human Rights Act's efficacy, it serves to confirm that the apparent improvement in human rights protection achieved by the Act.

By way of comparison with the experience of incorporation with the ECHR, in respect of the ICCPR, it has been shown that incorporation appears to have resulted in a significant increase in the number of cases making reference to the

[135] Such as, for example, when the Lord Chancellor suggested that s 3 would operate so that "if it is possible to interpret a statute in two ways – one compatible with the Convention and one not – the courts will choose the interpretation which is compatible". HL Deb 3 November 1997, vol 582, col 1230. This clearly frames compatibility as an issue for the judiciary.
[136] (n 43).
[137] Although this is only one example of many, it still remains a leading case on the use of s 3. Thus, for example, in the recent case of *R (Z and another) v Hackney London Borough Council* (n 44), (where the Supreme Court examined the interpretation of s 193 of the Charities Act 2010) and the court cites *Ghaidan* at [112] as a leading case in respect of the operation of s 3. A wider ranging discussion of the case law of s 3 is found in section 8.2.1 of this chapter.
[138] HL Deb 3 November 1997, vol 582, col 1227-1228.
[139] Ministry of Justice (n 60) 37–67.

ICCPR. Indeed, whilst there were six of these cases prior to the Human Rights Act, since 1998 there have been 165. This suggests that the greater awareness of and literacy around human rights instruments have resulted in lawyers and judges making greater use of the instruments such as the ICCPR. However, once these figures are examined more closely it becomes evident that although the courts have made 27.5 times more references to the ICCPR since the Human Rights Act, it has not frequently been used directly in judicial decision-making. Rather, most references are in passing or are part of a broader quotation.[140] Indeed, in only 25 cases did the ICCPR form a direct part of the judicial decision-making process in even a limited way. This serves to highlight the huge gap which has opened up between the effectiveness of the protections offered to those in England and Wales by the ICCPR and ECHR during this period.

On an international level the HRC, the treaty body for the ICCPR, has noted repeatedly as part of its periodic reviews of the UK's compliance with the ICCPR that there are issues in this respect. Indeed, the HRC has gone so far as to say that it "notes that the Covenant is not directly applicable in the State party and… recalls that several Covenant rights are not covered by the Human Rights Act 1998."[141] Alongside this concern sit a range of other concerns about the level of UK compliance with its obligations under the ICCPR, such as in relation to counter-terror legislation.

Taken together this shows that incorporation of the ECHR has led to significant improvements in the protection of the rights that that instrument affords to those in England and Wales. Under the Human Rights Act these rights are directly enforceable in the domestic courts against public bodies, and courts are required to work to ensure compliance with these rights by virtue of the Act. A requirement the courts have embraced. By contrast, the ICCPR's lack of incorporation appears to correlate directly with its lack of use as a method of rights protection for those in England and Wales. The absence of incorporation of the ICCPR also

[140] This fact was also noted by Clayton and Tomlinson, see Clayton and Tomlinson (n 12) para 2.58.
[141] UN Human Rights Committee 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (17 August 2015) UN Doc CCPR/C/GBR/CO/7, para 5.

correlates with concerns by the HRC about the availability of these rights to those in the UK as a whole. There remains no way for someone in any of the constituent nations of the UK to take action for a breach of their rights under the ICCPR. The gap between the protections offered by the ECHR and ICCPR, evident prior to the Human Rights Act,[142] has clearly now widened significantly.

[142] See chapters 4 and 7 for discussion of the enforcement processes of the treaties and their differences. The UK has never accepted the right to individual petition under Optional Protocol 1 of the ICCPR which has prevented the direct enforceability of these rights.

9. Conclusion

9.1 Introduction

This chapter draws together the analysis of human rights protection over the three time periods studied in this thesis. It does so in order to answer the research question, *viz* has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales? In doing so it shows that incorporation of the ECHR has secured better judicial enforcement of human rights in England and Wales.

This chapter first outlines the analysis of the three time periods under review in this thesis (before 1953, between 1953 and 1998, and after 1998). It then draws together the research from these periods to justify the conclusion that incorporation of the ECHR has made a significant difference to the enforcement of individual rights in England and Wales, illustrating the trends evident from an examination of both ECHR before and after the Human Rights Act and noting the comparison with the trends evident in the use of the ICCPR in the same periods.

Next the chapter sets out how this thesis can form the basis of further research in the field, in order more fully to understand the relationship between incorporation and human rights protection. This is particularly the case in relation to the ongoing debate about the future of the Human Rights Act and the protection of economic, social and cultural rights in England and Wales.

9.2 The Periods of Time

This section summarises the protection of rights in each of the three periods under investigation.[1] This complements the next section which draws conclusions based on the findings from the study of these periods of time.

[1] It does so by drawing on and summarising the work in chapters 6, 7 and 8. The graphs and data in the section below are reproduced from the relevant preceding chapters to aid in illustrating this summary.

9.2.1 The Period before 1953

As chapter 6 illustrated, prior to 1953 England and Wales had enjoyed a history which has at times placed it near the forefront of human rights protection. Indeed, Sieghart, for example, has noted that the it "has a good claim to be considered the cradle of human rights", noting that "from at least Magna Carta in 1215 [it] has contrived to excuse principles of 'civil rights' and 'civil liberties' from the interstices of a succession of internal political or economic power struggles."[2] But the approach to rights was centred not on positive rights, rather on liberties and freedoms.[3] This approach did not change significantly between Magna Carta and the twentieth century, and so Dworkin asserts that in terms of human rights England and Wales lagged behind most other nations by the turn of the millennium.[4]

One reason why England and Wales did not during this period adopt a more rights-based approach is the constitutional structure of the UK. This puts parliamentary sovereignty at its heart and prevented entrenched rights protection. This position is well summarised by Lester when he said that "The cornerstone of our system is the absolute and unfettered sovereignty of the national legislature. Parliament has the right to make or unmake any law whatsoever, and no person or body has the right to override or set aside the legislation of Parliament."[5] This in turn meant, he argues, that it was impossible to make a "distinction between laws that are not fundamental or constitutional and laws that are fundamental or constitutional, and there is no supreme law against which to test the validity of other laws."[6] Coupled with this was the predisposition against positive rights amongst legal scholars and thinkers. As De Smith pointed out in

[2] Paul Sieghart, 'Foreward' in Paul Sieghart (ed), *Human Rights in the United Kingdom* (Pinter Publishers 1988) 2–3.
[3] David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press 2002) 70.
[4] Ronald Dworkin, 'Does Britain Need a Bill of Rights?' in Richard Gordon and Richard Wilmot-Smith (eds), *Human Rights in the United Kingdom* (Oxford University Press 1996) 59.
[5] Anthony Lester, 'Fundamental Rights in the United Kingdom: The Law and the British Constitution' (1976) 125 University of Pennsylvania Law Review 337, 338.
[6] ibid.

1961: “until a few years ago Anglo-Saxon attitudes towards declarations of fundamental rights were almost uniformly unfavourable.”[7]

Liberties were viewed as perfectly adequate protection. Jennings noted that “In Britain we have no Bill of Rights; we merely have liberty according to the law; and we think – truly I believe – that we do a better job than any country which has.”[8] In spite of this, though, a number of statutes and charters did, in some way, seek to confer rights. Chapter 6 highlighted a number of examples in this field, notably Magna Carta, the Petition of Right, the Bill of Rights and the Habeas Corpus Act; although it also made clear that these were not “rights instruments” in the modern sense. They more closely resemble basic constitutional documents pertaining to the relationship between Parliament and the Crown. Most often, the rights they granted were only available to a few powerful and wealthy individuals and did nothing to assist the vast majority of people.

Whilst these protections are often regarded as important, in many cases they failed adequately to protect those who needed their assistance. Bingham asserted that “freedom from executive detention is probably the oldest of recognised human rights in reliance on chapter 39 of Magna Carta 1215”.[9] However, this freedom has an equally long history of being abused, demonstrating the risks of the liberties-based approach.[10] Similarly, while the Habeas Corpus Act 1640 was designed to reduce instances of arbitrary executive detention, within 30 years of the Act, complaints were made that officials were circumventing the Act “by sending persons to ‘remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law’” as the law did not extend to such places.[11] Thus, despite the fact that such rights and liberties existed they were largely at the mercy of Parliamentary will.

[7] SA De Smith, ‘Fundamental Rights in the New Commonwealth’ (1961) 10 International & Comparative Law Quarterly 83, 83.
[8] WI Jennings, *The Approach to Self-Government* (Cambridge University Press 1956) 99.
[9] Tom Bingham, ‘Personal Freedom and the Dilemma of Democracies’ (2003) 52 International & Comparative Law Quarterly 841, 842.
[10] See, e.g., the comments below in relation to mass detention in the UK during both World Wars
[11] Bingham (n 9) 843.

As late as 1942, Lord Wright asserted that in England and Wales "there are no guaranteed or absolute rights… The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved."[12] This served to highlight the prevailing attitude that the historic approach was both desirable and adequate. But, as chapter 6 showed, faith in liberty as the apex of rights protection was misplaced. There were many shortcomings in this approach. Thus, for example, "Parliament could always legislate fundamental rights out of existence".[13] Similarly, the courts were not always protective of rights and liberties. In *Elias v Passmore*, for example, it was held that "the interests of the state must excuse the seizure of documents which seizure would otherwise be unlawful".[14] Moreover, "it was not generally possible for judges to provide common law protection of a human right by fashioning a new cause of action" as this was the job of Parliament and not the courts.[15] Despite this the courts did work at times to try to protect liberties, working on the principle that interference with rights would require express legislation to that effect.[16] But as *Liversidge v Anderson* demonstrated, judges remained deferential to Parliament on issues of rights and liberties.

Perhaps the most telling examples of the power of the executive to curtail rights were evident in the treatment of those deemed hostile to the UK during both world wars. Thus, Regulation 14B made under the Defence of the Realm (Consolidation) Act 1914, granted the Home Secretary the power to detain a vast number of people on no more than a committee's recommendation that this would be expedient.[17] In spite of the tenuous source of this power, which was conferred by the regulation but not the Act, the courts upheld its lawfulness.[18] Similarly, during World War Two, powers were granted under a successor regulation, Regulation 18B, and used to arrest and detain many thousands. In all "Between

[12] *Liversidge v Anderson* [1942] AC 206, 261.
[13] Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd edn, Oxford University Press 2009) para 1.23.
[14] *Elias v Passmore* [1934] 2 KB 164, 173. A move away from the approach in *Entick v Carrington*.
[15] Clayton and Tomlinson (n 13) para 1.23.
[16] See Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286.
[17] Bingham (n 9) 846.
[18] In *R v Halliday* [1917] AC 260. This deference is clear in cases such as *R v Governor of Wormwood Scrubs Prison* [1920] 2 KB 305, in particular at 311.

1939 and 1945 almost 27,000 persons were detained in Britain without charge or trial and 7,000 were deported."[19] Simpson noted that "the courts did virtually nothing for the detainees."[20]

As has been shown, "The [UK] constitution has traditionally eschewed broadly worded textual pronouncements of fundamental rights, preferring, instead, to rely on the democratic process, the rule of law, and the United Kingdom's complex system of checks and balances to safeguard civil liberties."[21] Perhaps unsurprisingly, despite the fact that during this period the UK assisted in the drafting of both the ECHR and ICCPR, the sense of UK exceptionalism continued, with successive governments remaining assured that the existing approach remained not only adequate, but also the most desirable approach.[22]

Thus, chapter 6 illustrates that prior to 1953, the concept of positive rights, which could be enforced by individuals against the state in the courts had not emerged in England and Wales. Negative liberties dominated, with the courts nominally acting as guardians of liberty and ensuring that all state interference with liberty was legally authorised. However, the courts generally proved to be highly deferential to Parliament at the expense of individual freedoms. It could well be argued that, at the eve of the ECHR, the protection of rights in England and Wales had changed little in the previous centuries and offered the individual little protection whatsoever.

9.2.2 The period between 1953 and 1998

The next period under examination is that between 1953 and 1998. During this time the ECHR entered into force (in 1953), as did the ICCPR (in 1976). The ECHR was not a part of domestic law during this era but had an influence on the way in which the courts of Engand and Wales developed their jurisprudence in a

[19] Steyn (n 11) 4.
[20] AW Brian Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Clarendon Press 1994) 418.
[21] Douglas W Vick, 'The Human Rights Act and the British Constitution' (2002) 39 Texas International Law Journal 329, 330.
[22] For further discussion of this see chapter 4 and AW Brian Simpson, *Human Rights and the End of Empire* (Oxford University Press 2001).

range of areas. There are differing opinions on the extent to which the ECHR influenced the courts. Clayton and Tomlinson argued that "the practical impact of the Convention on domestic case law during this period was not great".[23] Bingham, by contrast, took the view that "the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country".[24] As demonstrated in chapter 7, Bingham's view appears to accord more closely with what actually happened during this period.

Bingham highlighted three areas where the ECHR's influence had been strongest: "the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law."[25] The use of unincorporated treaties in such situations was not a new phenomenon in the law of England and Wales, and such use was supported by cases such as *Salomon* which argued that Parliament would be assumed not to have legislated in breach of treaty.[26] This doctrine allowed the courts to use the ECHR in their reasoning.

Thus, for example, the House of Lords in 1974, in *Waddington v Miah*, made reference to the ECHR in respect of the retroactive application of criminal laws.[27] Nonetheless, as the judges of House of Lords noted, while they would look to use the ECHR to aid interpretation they were still "bound to give effect to statutes which are free from ambiguity in accordance with their terms."[28] Despite this caveat, during this period courts were increasingly willing to use the ECHR as an interpretive tool, in doing so allowing the slow expansion of the ECHR into judicial thinking in England and Wales.[29]

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[23] Clayton and Tomlinson (n 13) para 2.40. Citing Murray Hunt, *Using Human Rights in English Courts* (Hart 1997); Francesca Klug, Keir Starmer and Stuart Weir, *The Three Pillars of Liberty* (Routledge 1996); Francesca Klug and Keir Starmer, 'Incorporation Through the Back Door?' [1997] Public Law 223.
[24] *R v Lyons* [2003] 1 AC 976 para 13.
[25] ibid para 13.
[26] *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143.That this remains the case is confirmed in, e.g., Clayton and Tomlinson (n 13) para 2.09.
[27] *Waddington v Miah* [1974] WLR 683, 694.
[28] *Re M and H (Minors)* [1990] 1 AC 686, 721, per Lord Brandon.
[29] See chapter 7 for more discussion of this case law.

As shown in chapter 7, the courts used the ECHR to inform decision-making on the exercise of discretionary powers. This use saw significant growth, particularly in relation to administrative discretion. Indeed, it was argued that public officials exercising discretion ought to do so having regard to the ECHR.[30] This approach was strongly rejected by the court in *R v Chief Immigration Officer, Heathrow Airport, ex p Salamat Bibi*.[31] There, Lord Denning argued that it too created to great a burden on those making decisions.[32] Later, "This pragmatic argument was… extended to one of principle" and such a duty was rejected in respect of the exercise of discretion by the Secretary of State.[33] Despite this initial rejection, the law developed in this area. In *R v Secretary of State for the Home Department, ex p Bugdaycay* where the court ruled, in the context of the applicant's right to life, that when an administrative decision under challenge is said to be one which may put the applicant's right into question the basis for the decision must call for the most anxious scrutiny.[34] Additionally, in *R v Ministry of Defence, ex p Smith*,[35] the Court of Appeal endorsed the suggestion that "The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable".[36] Thus, the ECHR had a discernible, if often inconsistent, impact on the manner in which judicial review developed in England and Wales, and this period saw an increase in the use of human rights as a manner of assessing the legality of the exercise of administrative discretion.[37]

Finally, the ECHR had an impact on the development of common law. Thus, Lord Goff said in the *Spycatcher* case: "I conceive it to be my duty, when I am free to do so to interpret the law in accordance with the obligations of the Crown under

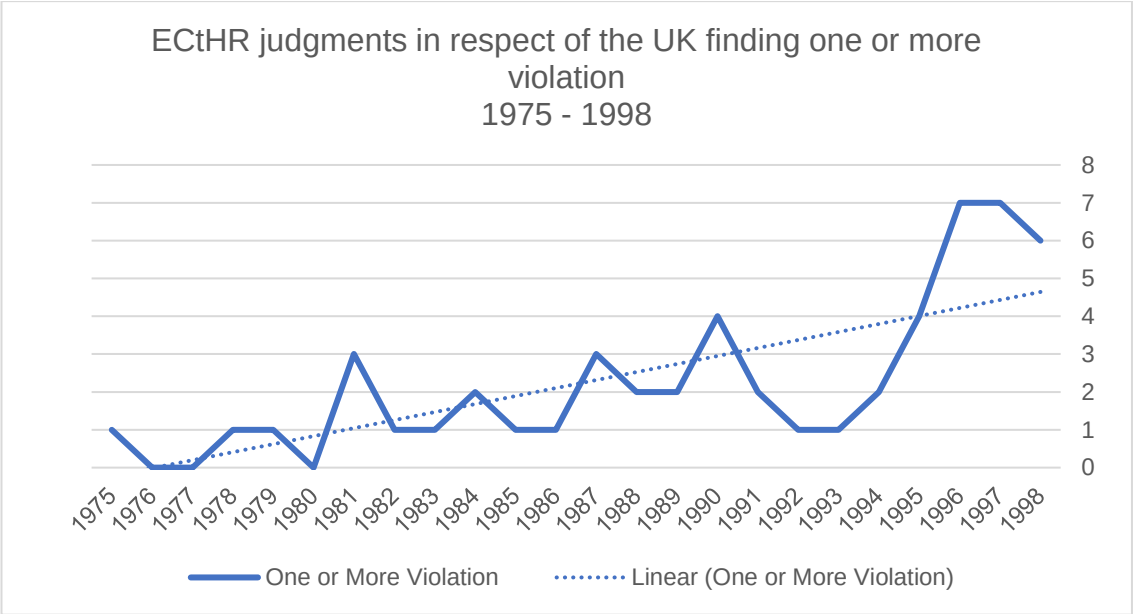
[30] This approach was initially successful, see, e.g., *R v Secretary of State for the Home Department, ex p Bhajan Singh* [1976] QB 198.
[31] [1976] 1 WLR 979.
[32] ibid 985. Lord Denning had initially supported the approach in *R v Secretary of State for the Home Department, ex p Bhajan Singh*.
[33] Clayton and Tomlinson (n 13) para 2.23. See also *Fernandes v Secretary of State for the Home Department* [1981] Imm AR 1.
[34] [1987] AC 514, 531.
[35] [1996] QB 517.
[36] ibid 554, per Bingham MR. This case was appealed to the ECtHR who found in favour of the applicants, *Smith and Grady v United Kingdom* [1999] IRLR 734.
[37] Hunt discusses, in significant detail, how the influence of human rights on administrative law developed, see Hunt (n 23) chs 4 and 5.

[the ECHR]."[38] This served to highlight his view that not only was he permitted to use the ECHR in interpreting the law, but compelled to do so. This approach was reiterated in *Derbyshire County Council v Times Newspapers Ltd*.[39] There Butler-Sloss LJ said that "where there is an ambiguity, or the law is otherwise unclear [the] court is not only entitled but… *obliged* to consider the implications of Article 10".[40] Her fellow justices concurred.

Nevertheless, not all commentators agreed with this approach. Clayton and Tomlinson, for example, argue that "As a matter of strict analysis… the claim that unincorporated treaties are a legitimate tool for the development of the common law where it is otherwise ambiguous is open to question."[41] Such an assertion appears to run contrary to a significant number of judicial decisions. Although this development was welcome, as it saw judges increasingly making reference to the ECHR, the continuation of such an approach was overly reliant on judges' willingness to apply the ECHR in the absence of an overt obligation to do so, or a framework to guide them in doing so consistently.

Whilst at a domestic level it is clear that during this period the ECHR came to be more widely used by the courts in their decision-making, it is also clear that this did not prevent the UK from losing an increasing number of cases before the ECtHR. The chart below uses this data to show that the UK was found to be in violation in an increasing number of cases by the ECtHR prior to 1998.[42]

[38] *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283. Although in that case Lord Goff suggested there was in fact no inconsistency between the ECHR and English law on freedom of expression.
[39] [1992] 1 QB 770 (Court of Appeal), [1993] AC 534 (House of Lords).
[40] ibid 830, emphasis added.
[41] Clayton and Tomlinson (n 13) para 2.18.
[42] This data reflects judgments in respect of all the constituent nations of the UK as the ECtHR does not provide data beyond country level. Figures taken from the ECtHR's statistics (available at <https://www.echr.coe.int/Pages/home.aspx?p=reports&c=> accessed 18 December 2020) and Alice Donald, Jane Gordon and Philip Leach, *Research Report 83: The UK and the European Court of Human Rights* (Equality and Human Rights Commission 2012).



The data from 1975-1998 suggests that the increasing use of the ECHR in the domestic courts had, to some extent, allowed individuals to secure their rights. The data also shows that increasing judicial reference to the unincorporated ECHR did not prevent infringements of those rights. Furthermore, it highlights that this problem became more acute as the debate around incorporation began to come to fruition in the 1990s.

By contrast with the increasing use of the ECHR in the courts of England and Wales during this period, chapter 7 shows that after entering into force in 1976 the ICCPR was hardly engaged with at all by the courts. Indeed, "In 1984, the United Kingdom Government's representative to the UN Human Rights Committee was unable to identify even one case in which the British Courts had made reference to the Covenant."[43] This is despite the fact that the ICCPR itself creates an obligation on states parties to give effect to the treaty within their national legal systems.[44]

One rare exception to the almost total lack of action on the part of the UK in respect of incorporation of the ICCPR is found in the Criminal Justice Act 1988 which incorporated the protections in Art 14(6) relating to the award of damages

[43] Clayton and Tomlinson (n 13) para 2.56.
[44] Article 2(2).

for the victims of miscarriages of justice.[45] As chapters 7 and 8 showed, this minor act of incorporation affected the way in which the ICCPR was used by the courts.

Chapter 7 showed that there were only six references to the ICCPR in reported cases between 1976, when it entered into force, and 1998.[46] These six cases themselves, moreover, highlight the unwillingness of the courts to engage with the ICCPR in any depth. The one case in which the ICCPR was given any significant consideration related to s 133 of the Criminal Justice Act 1988;[47] the others did not see any real judicial engagement with the ICCPR beyond an initial reference or observation.[48] One judgment rejected the use of the ICCPR outright.[49] Thus, compared with the ECHR, clear jurisprudence in relation to ICCPR was not developed by the courts during this period. Nor, with the exception of the incorporation of Article 14(6), did Parliament take any action to secure through legislation the rights the ICCPR protected.

Summing up and comparing both the ECHR and ICCPR's influence on judicial decision-making during this period, it is clear that the former had much greater impact than the latter. As chapter 7 showed, the ECHR had driven the development of the law in three main areas: the interpretation of statutory provisions, the exercise of discretions, and the development of the common law in respect of rights.[50] Despite this, any suggestion that the ECHR had become a focal point for judges is wrong. Rather, it slowly gained traction and came to be seen as an important tool which could aid judges' decision-making. Hunt suggests that the reason for this growing awareness might have been that there was a "slowly dawning awareness of the potential significance of the ECHR system" and the potential impact on the UK of the number of cases being lost

[45] As is shown in chapter 8, this act of partial incorporation is responsible for the majority of references to the ICCPR in the judgments of UK courts.
[46] Moreover, Klug, Starmer and Weir wider analysis found only a total of ten cases between 1972 and 1993 where the ICCPR had been mentioned, and mentions of the ICCPR in Parliament were even less frequent: Francesca Klug, Keir Starmer and Stuart Weir, 'The British Way of Doing Things: The United Kingdom and the International Covenant of Civil and Political Rights, 1976-94' [1995] Public Law 504, 508. See also Hunt (n 23) Appendix 1.
[47] *R v Secretary of State for the Home Department ex p Bateman* (1995) 7 Admin LR 175.
[48] For example, *Airedale NHS Trust v Bland* [1993] AC 789.
[49] *R v Ministry of Defence ex p Smith* [1996] QB 517.
[50] *R v Lyons* (n 24) para 13.

before the ECtHR.[51] This observation fits the narrative developed in chapter 7 and seems to explain well why the use of the ECHR increased as time passed. Whilst the increasing use of the ECHR in domestic decision-making could not, by itself, guarantee respect for all the rights contained in the ECHR, it represented a marked improvement on the protections which had existed prior to 1953, outlined in chapter 6.

By contrast, the ICCPR did not have such an impact, as chapter 7 demonstrated. The courts did not come to use the ICCPR in anything like the manner in which they had used the ECHR. As Klug, Starmer and Weir noted in 1995, the ICCPR did not meet with any changes in domestic law, nor did nor, at the UK level, did it accept the rights of individual petition under the treaty. Thus, the ICCPR "had a very limited impact upon the quality of… freedom in this country."[52] The lack of development of the ICCPR as a tool to aid judicial decision-making arguably represented a missed opportunity, particularly as it provides greater protection in some areas than the ECHR.[53] It is also not clear why such a disparity exists between the ICCPR and ECHR. One possible answer is the UK's continued refusal to accept the right of individual petition to the HRC and thus no dialogue developing as it had between the domestic scourts and the ECtHR.

During this period, alongside the gradual development of the use of the ECHR, described as incorporation "through the back door" by Klug and Starmer,[54] there were increasing calls for incorporation to take place.[55] However, although there were continued attempts in both the House of Commons and the House of Lords to incorporate the ECHR, no solid progress was made prior to 1997.[56] That year saw the publication of a white paper for a human rights bill. [57] The bill set out to

[51] Hunt (n 23) 133.
[52] Klug, Starmer and Weir (n 46) 504.
[53] See chapter 4.
[54] Francesca Klug and Keir Starmer, 'Incorporation Through the Back Door' (1997) 1997 Public Law 223.
[55] These had gone on for many years. Lord Lambton had introduced a bill which sought to protect human rights through domestic law as early as 1969, see HC Deb 23 April 1969, vol 782, col 474.
[56] The history of the movement towards a bill of rights is examined in depth in section 7.6.1 of chapter 7.
[57] Home Department, *Rights Brought Home: The Human Rights Bill* (White Paper, Cm 3782, 1997).

make the rights protected by the ECHR justiciable in the UK's courts (and thus the courts of England and Wales) in a clear way and aimed to improve the ability of individuals to enforce their rights without unnecessary delay and cost.[58] It received royal assent in 1998 becoming the Human Rights Act, and radically changed the rights landscape of the whole of the UK.

Chapter 7 demonstrated that the period between 1953 and 1998 saw a rapid development of the law of human rights, with the law moving away from liberties and towards positive rights. The judiciary became increasingly willing over these decades to have recourse to the ECHR when faced with human rights sensitive cases, demonstrating a growing understanding of the impact of the ECHR on individual rights in England and Wales and the slow growth of the ECHR as a legal tool of the courts. Nonetheless, this heightened willingness to use the ECHR in judgments did not prevent the UK losing an increasing number of cases before the ECtHR, illustrating that whilst this new approach was an improvement on that which had gone before, it still failed to provide strong rights protection. Similarly, the ICCPR lagged behind the ECHR during this period. While Article 14(6) *was* incorporated during this period, the courts only made reference to the ICCPR six times, and, even then, without great enthusiasm.

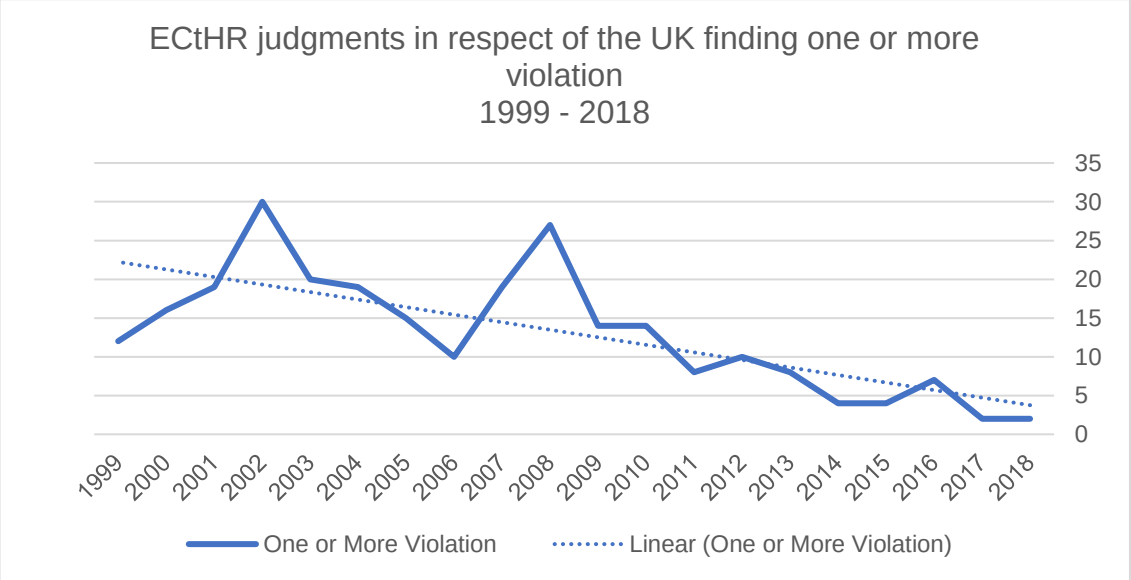
9.2.3 The period from 1998-2018

The final period under examination is that from 1998, when the Human Rights Act received royal assent, to 2018.[59] The Human Rights Act incorporated the ECHR into UK law, and thus into the law of England and Wales. As outlined in chapter 8, the Act, in addition to making the ECHR rights justiciable in the domestic courts, provided the judiciary with a range of tools designed to enable the courts to protect individual rights more easily and effectively. As McGoldrick asserted its significance is widely regarded to have been "enormous to the point of revolutionary."[60] As chapter 8 showed, the Act gave the courts wide interpretive

[58] The Bill and surrounding debate are discussed in depth in section 7.6.2 of chapter 7.
[59] Although it did not enter into force until October 2000.
[60] Dominic McGoldrick, 'The United Kingdom's Human Rights Act 1998 in Theory and Practice' (2001) 50 International & Comparative Law Quarterly 901, 945.

powers by way of s 3 and the power to make non-binding declarations of incompatibility under s 4.[61]

One way of demonstrating the Human Rights Act's effectiveness in improving the UK's compliance with the ECHR is by reference to the ECtHR's judgments against the UK during this period of time. As chapter 7 had showed, findings of violation against the UK were increasing prior to 1998. But, as the Equality and Human Rights Commission noted, the Human Rights Act was expected to coincide with a decrease in such findings.[62] The data illustrated that this prediction was accurate, as the chart below demonstrates.[63] Although, as chapter 8 noted, this data was not a definitive assessment of the state of rights protections in the UK, rather it functions to corroborate the expectation that the Human Rights Act was likely to improve UK compliance with the ECHR.



[61] Section 8.2 chapter 8 discusses these in detail and also notes that s 19 made progress in requiring Parliament to consider the compatibility of any new legislation with the Human Rights Act during its passage through Parliament.

[62] Donald, Gordon and Leach (n 42) 36. Despite the fact that there is a continued rise until 2002 this reflects the fact that a lag is likely between the passage of the Human Rights and the impact being seen, as cases made their way to the ECtHR. Amos suggested that this was likely to take about 5 years, a prediction which seems to have been roughly correct. See Merris Amos, 'Dialogue with Strasbourg' (Tenth Anniversary of the Human Rights Act Symposium, Durham Human Rights Centre Conference, 24 September 2010).

[63] Figures taken from the ECtHR's statistics (<https://www.echr.coe.int/Pages/home.aspx?p=reports&c=> accessed 18 December 2020) and Donald, Gordon and Leach (n 42).

The Human Rights Act radically altered the way in which judges dealt with questions of human rights. It provided a statutory basis for the use of the rights contained in the ECHR in domestic courts, although these courts had already made use of these rights in their work to some extent, as chapter 7 demonstrated. As chapter 8 showed, the courts fully embraced these broader powers.

Section 3 of the Human Rights Act was widely used by the courts to ensure the rights compliance of legislation, where possible. Moreover, the courts showed themselves willing to use these powers. Kavanagh suggests that s 3 may seem to alter the status quo radically but that "the difference post-HRA lies more in the judiciary's willingness to use existing (creative) techniques of statutory interpretation and in their sense of legitimacy in doing so".[64] As has been shown these powers already existed to some extent.[65] Young also asserts that the Human Rights Act meant that the judiciary became the custodians of rights protection.[66] Thus, incorporation provided the courts with greater legitimacy in dealing with questions of interpretation and human rights.

Conversely, s 4 impacted less dramatically upon the courts' approach to human rights. Wilson Stark is one commentator who has argued that the courts have not made enough use of s 4, characterising "the traditional judicial approach to s 4" as "unsatisfactory and unduly deferential to the executive."[67] Similarly, Klug analysed cases where the courts had refused a request for a s 4 declaration, and asserted that the power to make declarations of incompatibility was central to the operation of the Human Rights Act and needed rehabilitation as such declarations had not been widely made.[68] By contrast, the courts had themselves noted that s

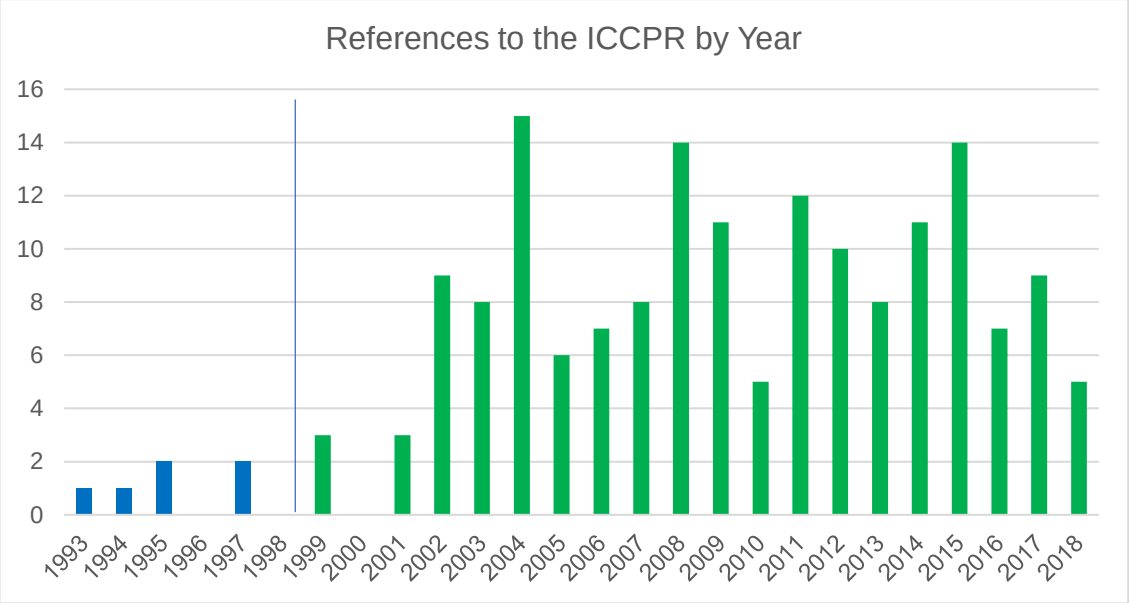
[64] Aileen Kavanagh, 'Choosing between Sections 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after *Ghaidan v Mendoza*' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial reasoning under the UK Human Rights Act* (Cambridge University Press 2007) 141.
[65] See chapter 7 for discussion of the use of the ECHR prior to the Human Rights Act.
[66] Alison Young, 'Judicial Sovereignty and the Human Rights Act 1998' (2002) 61 Cambridge Law Journal 53, 53.
[67] Shona Wilson Stark, 'Facing Facts: Judicial Approaches to Section 4 of the Human Rights Act 1998' (2017) 133 Law Quarterly Review 631, 631. Although Wilson Stark also acknowledges that such a declaration must actively be sought by the claimant so that it is not solely the at the discretion of the court to make such a declaration, see ibid 632.
[68] Francesca Klug, 'Judicial Deference under the Human Rights Act 1998' [2003] European Human Rights Law Review 125, 131 emphasis in original.

4 should operate as "a measure of last resort",[69] perhaps explaining their infrequent use of the power.

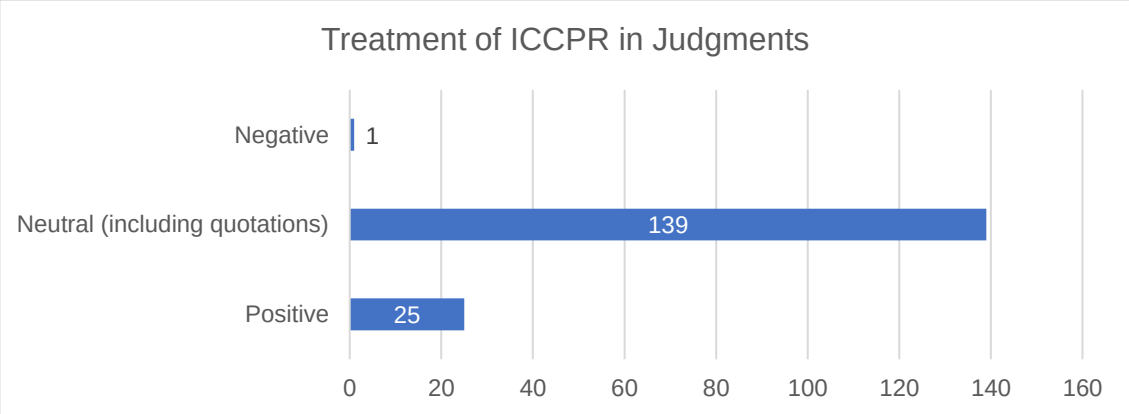
The Human Rights Act clearly allowed the courts to develop a more consistent approach to statutory interpretation where issues of human rights are concerned, and empowered them to highlight to Parliament issues which cannot be resolved by interpretation. As chapter 8 noted, however, there have also been criticisms of the Act. Tugendahdt, for example suggested that it has led to "Judicial activism" which has "become a central issue in the debate on whether the Human Rights Act 1998… should be amended or replaced".[70] Similarly, the current Attorney General, Suella Braverman attacked the Human Rights Act as the source of a perceived increase in judicial power.[71] It seems fair to suggest that judges have been emboldened by the Human Rights Act, but, given that this is in furtherance of the protection of human rights, this boldness seems neither to be negative, nor to challenge the sovereignty of Parliament. Nonetheless, the apparent change in judicial behaviour remains deeply controversial.

In respect of the ICCPR, chapter 8 demonstrated that the picture has been less positive. References to the ICCPR in judgments in England and Wales has vastly increased since 1998, as the chart below demonstrates.[72] It is not entirely clear why this increase has occurred, but it seems likely that an increased awareness of human rights, by virtue of the Human Rights Act, may have led to a wider use of other instruments, such as the ICCPR.

[69] *R v A* (No.2) [2001] UKHL 25, [2002] 1 AC 45, para [44] per Lord Steyn.
[70] Michael Tugendhat, 'Privacy, Judicial Activism and Democracy' (2018) 23 Communications Law 63, 63.
[71] Suella Braverman, 'People We Elect Must Take Back Control from People We Don't. Who Include the Judges.' (*Conservative Home*, 27 January 2020) <https://www.conservativehome.com/platform/2020/01/suella-braverman-people-we-elect-must-take-back-control-from-people-we-dont-who-include-the-judges.html> accessed 18 December 2020.
[72] This data is drawn from the survey of cases mentioning the ICCPR outlined in the methodology chapter of this thesis (chapter 3). A full list of these cases can be found in Appendix 1.



As chapter 8 also demonstrated, although the period saw a vast increase on the six references prior to 1998 (there were 165 up to 2018), the use of the ICCPR was sporadic, showing no trend of continuous growth of reference, or a consistently high number of references by the courts. Moreover, in the 165 cases where the ICCPR *was* used, the majority of references were neutral, meaning that the courts did not rely on the ICCPR in developing their reasoning or in reaching their conclusion.[73]



Of the 25 positive references, (where the courts made use of, or engaged with, the ICCPR itself as part of their decision-making process) the majority either:

[73] This data is gathered from the survey of the cases which mentioned the ICCPR carried out for this thesis.

related to asylum decisions,[74] involved some in-depth discussion of the intention of the legislators when drafting s 133 of the Criminal Justice Act,[75] or involved facts centred outside of England and Wales, and, indeed, the UK.[76] There was no evidence of the same kind of development of jurisprudence specific to the ICCPR as took place in relation to the ECHR prior to incorporation.[77]

Whilst it was shown that the courts became more willing to mention the ICCPR in their judgments during this period, examination of the HRC's responses to the UK's periodic reporting demonstrated the impact of the Human Rights Act on the UK's compliance with the ICCPR.[78]

In 2008 (ten years after the passage of the Human Rights Act) the HRC highlighted several concerns with the UK's ICCPR compliance. In particular it noted "that the Covenant is not directly applicable in the State party". [79] The HRC further noted that this was a cause for concern as "several Covenant rights are not included among the provisions of the European Convention on Human Rights which has been incorporated into the domestic legal order through the Human Rights Act 1998."[80] This suggests strongly that the HRC believed that the ICCPR's protections had not fully been realisedat a domestic level, despite the UK's international obligations. Again in 2015, the HRC raised concerns about the UK's compliance with the ICCPR.[81] These two sets of concluding observations highlighted the range of issues of concern to the HRC with respect to the UK's compliance with the ICCPR. They illustrate that the Human Rights Act has not

[74] Such as, e.g., *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856.
[75] See, e.g., *R (on the application of Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48. As has been discussed previously s 133 incorporated Article 14(6) of the ICPPR into domestic law.
[76] Such as, e.g., *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76.
[77] As discussed in chapter 7.
[78] Periodic reporting is discussed in chapter 4.
[79] UN Human Rights Committee 'Concluding observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc CCPR/C/GBR/CO/6, para 6.
[80] ibid. See also chapter 4 for a discussion of the differences between the protection offered by the two instruments.
[81] UN Human Rights Committee 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (17 August 2015) UN Doc CCPR/C/GBR/CO/7.

prevented the UK being in breach of its obligations under the ICCPR, and that little improvement was made in respect of the UK's compliance with the ICCPR during this period.

Chapter 8 illustrated that, during the period from 1998, there was a significant improvement in the protection of the ECHR rights as a result of incorporation. The Human Rights Act allowed the courts to address issues proactively and effectively, as is demonstrated by the UK's improving track record at the ECtHR during this time. By contrast, however, although the ICCPR appeared more frequently in judgments during this time, the courts failed to develop their jurisprudence in the way they had with the ECHR prior to incorporation. Similarly, the HRC's observations show that during this period the UK's compliance with the ICCPR did not drastically improve.

9.3 Answering the Research Question

The summary preceding this section has outlined the results of the survey of each time period under examination. It ties these results together to make a number of findings and to answer the question posed by this thesis, *viz* has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales?

In respect of the period before 1998, chapters 6 and 7 served to demonstrate that the post-war human rights movement, and the instruments which resulted from it, in this case the ECHR and ICCPR, improved human rights in England and Wales. As shown in chapter 7, the UK's membership of the ECHR correlated with a shift from the negative, liberties-based approach to rights which had predominated before that point.[82] In place of this approach, the courts of England and Wales became increasingly willing to make reference to unincorporated human rights instruments, albeit in very particular circumstances, for example,

[82] As Vick noted "The [UK] constitution has traditionally eschewed broadly worded textual pronouncements of fundamental rights, preferring, instead, to rely on the democratic process, the rule of law, and the United Kingdom's complex system of checks and balances to safeguard civil liberties." Vick (n 21) 330.

"the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, [and] bearing on the development of the common law".[83] The use of the ECHR was particularly pronounced from the 1970s.[84] Even though use of the ECHR waned in the in the 1980s, there was towards the middle of the 1990s a "gradual judicial acceptance of a full interpretive obligation in relation to international human rights standards."[85] By 1997, commentators such as Klug and Starmer were questioning whether the ECHR had been incorporated "through the back door".[86] Nonetheless, the rights protected by the ECHR were not actionable in UK courts of England and Wales during this period, and despite the use of the ECHR gaining traction prior to the Human Rights Act 1998, this period also saw an increasing trend of the ECtHR finding the UK in violation of its international obligations to protect the ECHR rights.[87] This serves to suggest that whilst the courts were seeking to use the ECHR more widely, they were unable to remedy all instances of rights infringement.

By contrast, the ICCPR did not have such an impact. Indeed, writing in 1995 Klug, Starmer and Weir assert that no change had been brought about in England and Wales as a result of the ICCPR.[88] Certainly even though the ICCPR was mentioned in judgments during this period, it was only referred to in six times by the courts, and even then it was not a central aspect of the court's reasoning or decision making.[89] Thus, it is evident from this research **that it is possible in the for the courts in England and Wales to make use of unincorporated instruments to protect human rights. However, this protection does not appear to have been particularly effective in all cases. Thus, as has been shown, there was little improvement in compliance with the ICCPR arising from judicial use of the treaty.** This thesis cannot assert categorically that the

[83] *R v Lyons* (n 24) para 13.
[84] Hunt (n 23) 160.
[85] ibid 131.
[86] Klug and Starmer (n 23).
[87] This is well illustrated in Joanna Dawson, 'Briefing Paper: UK Cases at the European Court of Human Rights since 1975' (House of Commons Library 2019) CBP 8049.
[88] Klug, Starmer and Weir (n 46) 504. Although this ignores the fact that Article 14(6) had been incorporated by way of s 133 of the Criminal Justice Act 1988.
[89] A broader survey, mentioned in Klug, Starmer and Weir, which included examining counsels' arguments as well as court judgments, found a total of ten cases between 1972 and 1993 where the ICCPR had been mentioned, and mentions of the ICCPR in Parliament were even less frequent: ibid 508. Hunt's survey illustrates the same point: Hunt (n 23) Appendix 1.

same finding would be true for other human rights instruments, and more work remains to be done with regard to instruments such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, to take just two examples.

As was noted above, prior to the Human Rights Act 1998, the ICCPR was only referred to in six judgments in England and Wales. In the period between 1998 and 2018 the number of references to the ICCPR increased almost thirty-fold to 165.[90] This may well result from an increased rights awareness and knowledge amongst litigants and their legal advisers, but this thesis has not been able to demonstrate precisely why such a significant increase occurred. It is possible that further research could provide an answer to this question. Nevertheless, in only a minority of those 165 cases did the courts engage with the content of the ICCPR as in some way part of their reasoning, i.e. the courts used the ICCPR as a tool is explaining reasoning or arriving at a decision. Indeed, this was only the case in 25 judgments. Of these 25 positive references, where the courts made use of, or engaged with, the ICCPR itself as part of their decision-making process, the majority either related to events outside the UK or involving another country (e.g. asylum cases), or related to s 133 of the Criminal Justice Act. The courts did not engage in the development of a jurisprudence specific to the ICCPR as they had with the ECHR.[91] Thus, **there appears to be a correlation between incorporating one human rights instrument and an increase in references to others, suggesting that incorporation improves rights literacy and knowledge more widely than simply in relation to the instrument which is incorporated**. **Nevertheless, such an increase does not improve the effectiveness of unincorporated instruments as a means of rights protection alongside the incorporated instrument.** This seems to stem from the (understandable) preference for using an incorporated instrument rather than an unincorporated one. This finding also highlights that whilst the use of references to a treaty by the courts as a proxy for assessing their effectiveness can work, this method needs to be approached with caution as it does not always give an accurate picture. Indeed, it is necessary to supplement quantitative

[90] These figures are based on the survey carried out for this thesis and contained in appendix 1.
[91] As discussed in chapter 7.

assessments of treaty use with an analysis of the wider picture, including treaty body reports and doctrinal analysis of the law.

As was highlighted above, the period before the Human Rights Act saw an increase in the number of cases in which the ECtHR found the UK in violation of its duties under the ECHR.[92] Indeed, this trend developed from the point at which the UK accepted the right of individual petition to the ECtHR.[93] From 1975 when the UK lost its first case before the ECtHR there was a steady trend of increasing adverse judgments against the UK.[94] Although this fact does not, of itself, prove that were more human rights breaches in the UK in the 1990s than in the 1970s, it does suggest that the UK's approach to human rights was not deemed to be sufficiently effective by the ECtHR. By contrast, in the period after the Human Rights Act there was a trend in the opposite direction, with increasingly few judgments of the ECtHR finding against the UK.[95] It appears to be the case that incorporation of the ECHR by way of the Human Rights Act has improved the UK's track record at the ECtHR. Interestingly, it might reasonably have been anticipated that greater human rights awareness might have led to an increase in challenges of public authorities on human rights grounds. The improvement of the UK's track record suggests that even if more cases were raised, the domestic courts of were able to provide an effective forum for raising and resolving breaches of human rights. Therefore, **incorporation of the ECHR appears to correlate with an improved track record before the ECtHR.** Although it should be noted that it is necessary to examine data on the UK's track record before the ECtHR carefully as other factors, such as changing processes for managing workload at the ECtHR itself, may also have an impact on these statistics.

Taken together these findings suggest that incorporation led directly to better human rights protection. Thus, it appears that the incorporation of the ECHR into domestic law by way of the Human Rights Act 1998 secured better judicial

[92] The full range of cases of the ECtHR in respect of the UK is outlined in Dawson (n 88).
[93] The UK accepted the right of individual petition in 1966.
[94] The first judgment against the UK was *Golder v UK* [1975] 1 EHRR 524. The UK lost this case.
[95] This assertion is based both on Donald, Gordon and Leach (n 42) and figures from the ECtHR's statistics (<https://www.echr.coe.int/Pages/home.aspx?p=reports&c=> accessed 18 December 2020).

enforcement of human rights in England and Wales . This finding is supported by the fact that there were increasingly few judgments against the UK by the ECtHR after the Human Rights Act, in addition to the clear domestic case law which showed that the courts of England and Wales used the powers granted to them by the Act to limit breaches human rights or to alter Parliament to breaches which the courts were unable to remedy.

By contrast, the ICCPR did not fare as well. The incorporation of the ECHR led to greater rights awareness and literacy, and to an increase in the number of references to the ICCPR by the courts of England and Wales, but this did not translate into the judiciary using the ICCPR as a decision-making tool in order to protect further the rights it guarantees over and above those contained in the ECHR. This thesis has not been able categorically to state why the ICCPR has not been developed in the way the ECHR was by the courts prior to incorporation. It seems likely that a key factor for this disparity may be that the UK has not accepted the right of individual petition to the HRC and thus, no dialogue between the HRC and the UK has been established as it was between the ECtHR and the UK. As the HRC's observations about the protection of the ICCPR in UK law served to show, the HRC remained concerned that the rights secured by the ICCPR were not enforceable in any constituent nation fo the UK, even after the Human Rights Act.

The protection of human rights in England and Wales improved sharply after the UK became party to the ECHR and ICCPR, as the judiciary became willing to centre their reasoning on these, then unincorporated, instruments. However, it was not until after incorporation of the ECHR that individuals in England and Wales, and the UK more broadly, were able to seek to enforce their rights directly before domesic courts. That this has improved the ability of the courts to protect the rights of the individual has been demonstrated and corroborated in a number of ways throughout this thesis. Moreover, the contrast between the incorporated ECHR and the unincorporated ICCPR serves to highlight strikingly how much

difference incorporation makes.[96] The only conclusion which appears capable of being drawn on the basis of this is that **incorporation of the European Convention on Human Rights secured better judicial enforcement of human rights in England and Wales.**

9.4 Further research agenda

As this thesis examined by direct comparison the changes brought about by incorporation of a human rights treaty it had to focus on civil and political rights. This is because the ECHR is the only human rights treaty which has been incorporated into domestic law.[97] Similarly, as discussed in chapter 4, the ICCPR was the most appropriate instrument to compare it with, given their broadly similar scope and similar historic backgrounds.[98]

This narrowing down of scope means that this thesis does not address other groups of human rights. In particular one avenue for further research would be ICCPR's sister treaty, the ICESCR.[99] The rights protected by the ICESCR have historically not enjoyed the same amount of academic attention in England and Wales as civil and political rights, but there is a growing range of research in this field.[100] Thus one area where there is significant scope for further research, building on the findings of this thesis, is in respect of the furthering of economic, social and cultural rights in England and Wales. In particular, how lessons about the UK's lack of compliance with the ICCPR might inform the way in which rights protected by the ICESCR might best be secured in England and Wales, and in the UK more broadly. Similarly, there is much scope to examine further the rights protected by more specialised rights treaties, for example, the Convention on the

[96] This point is also borne out by the incorporation of Article 14(6) of the ICCPR by way of s 133 of the Criminal Justice Act. As has been demonstrated, this small act of incorporation has resulted in the majority of references to the ICCPR in UK case law and has allowed UK judges to enforce the protections offered by Article 14(6) of the ICCPR.
[97] See section 8.2 of chapter 8 which *inter alia* discusses the extent to which the ECHR was incorporated by the Human Rights Act.
[98] Although, as chapter 4 shows, the ICCPR offers in some cases greater and broader human rights protection.
[99] The divergence between the protection of these rights and civil and political rights is discussed in chapter 4.
[100] See, e.g., publications such as Jackie Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2020).

Rights of the Child and the Convention on the Elimination of all forms of Discrimination Against Women.

A second narrowing of scope in this thesis was necessary in terms of geography in order to ensure the feasibility of this research. Thus, this thesis examined only England and Wales and not either Scotland or Northern Ireland. As the Human Rights Act extends to the entirety of the UK there is scope to continue this research by examining whether Scotland and Northern Ireland have had different experiences with both the ICCPR and ECHR. Northern Ireland is likely to have had a significantly different experience with both instruments and over the final two periods under examination, given the history of conflict in Northern Ireland over the last number of decades.[101] Although work has already been carried out to further the knowledge of the way human rights have operated in Northern Ireland,[102] there is scope for more comparative work to take place examining how Northern Ireland's experience contrasts with the experience of England and Wales.

Similarly, Scotland has had a different experience with human rights when compared with England and Wales. However, the Scottish experience has been more progressive. In recent times, for example, the Scottish Government introduced a bill to incorporate the Convention on the Rights of the Child.[103] Thus, there is scope for the findings of this thesis to inform further the debate on incorporation in Scotland as well as for the methods developed for this research to be applied to the changes brought about by incorporation of other instruments, such as the Convention on the Rights of the Child.

Finally, there is the potential for further research that builds directly on this thesis. It was not possible in the time available to combine the doctrinal and socio-legal

[101] Indeed, HRC observations over the decades highlight the extent to which Northern Ireland's experience with human rights differs from the rest of the UK.
[102] See, e.g., Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press 2012).
[103] The bill was introduced on 1 September 2020. The text of the bill is available here: <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill/introduced/bill-as-introduced-united-nations-convention-on-the-rights-of-the-child-scotland-bill.pdf> accessed 18 December 2020.

research with empirical research to add further colour to the findings. Thus, there is scope to seek to understand more clearly the reasons for the judicial use of both the ICCPR and ECHR by carrying out interviews with serving and former judges. This additional research would aim to help to explain the lack of use of the ICCPR by comparison to the ECHR, adding another dimension to the findings of this thesis.

Importantly this, and any further, research comes at a time of significant debate about the future of human rights protection in the UK. This thesis has shown that the Human Rights Act significantly improved human rights protection in England and Wales, yet the Act is increasingly subject to criticism. As early as 2007 Fenwick, Phillipson and Masterman noted:

> the [Human Rights Act] currently exists in a climate very different from that prevailing in 2000. We no longer feel that we are at the beginning of a new dawn for civil liberties in the UK. The emphasis of policy-makers is often no longer on the benefits of the [Human Rights Act]; the post-9/11 debate tends to concern methods of avoiding its effects.[104]

This is even more true today when there remain regular attacks from commentators and the world of politics. Such critics argue that the Human Rights Act has made the judiciary too powerful or protects the wrong people.[105] The most recent Conservative Party manifesto, on which the current Government was elected, pledged to "update" the Human Rights Act.[106] At present there is little clarity as to what this will mean, but it is has been announced that there will be an independent review of the Human Rights Act, similar to the ongoing Independent Review of Administrative Law, to examine the way in which the

[104] Helen Fenwick, Gavin Phillipson and Roger Masterman, 'Introduction' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial reasoning under the UK Human Rights Act* (Cambridge University Press 2007) 4.
[105] For an overview of these attacks see, e.g., Jacques Hartmann and Samuel White, 'The Alleged Backlash against Human Rights: Evidence from Denmark and the UK' in Kasey McCall Smith, Andrea Birdsall and Elisenda Casanas Adam (eds), *Human Rights in Times of Transition: Liberal Democracy and Challenges of National Security* (Edward Elgar 2020).
[106] Conservative Party, 'The Conservative and Unionist Party Manifesto 2019' (2019) <https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf> accessed 18 December 2020.

Human Rights Act has operated.[107] Thus, it is hoped that the research carried out in this thesis and the findings made may be able to form the basis of evidence to such a commission in support of the Human Rights Act.

9.5 Overall conclusion

This chapter has sought to tie together the various threads which make up this thesis. It has shown that in each of the three periods under examination the law of human rights changed significantly. There were vast improvements evident between 1953 and 1998 with the advent of the international human rights movement in the wake of the Second World War, and then again from 1998 onwards, following incorporation of the ECHR. This served to highlight the inadequacy of the liberties-based approach in protecting human rights in the twentieth and twenty-first centuries. It has also illustrated that this research has not only combined doctrinal and socio-legal research methods in order to answer the research question, but also that the innovative method which was developed has been successful in answering that question.

Importantly, it has also shown that although this research has contributed to the understanding of how incorporation functions in England and Wales, it has not been able to address all the questions which abound in this field. In particular, given the time and resources available to complete this research it was not possible to examine how the courts in either Scotland or Northern Ireland have experienced incorporation and the changes it has brought. Particularly in the case of the latter where the advent of the international human rights movement coincided with escalating violence and repression but where the Human Rights Act coincided with the beginning of a more lasting peace. As a result, in respect of both jurisdictions, there is scope for more research based on what has been undertaken here. Similarly, it was not possible to carry out empirical research

[107] This was confirmed by the Lord Chancellor and Secretary of State for Justice on 18 November 2020. A transcript of the evidence is available here: <https://committees.parliament.uk/ oralevidence/ 1250/pdf/> accessed 18 December 2020. It was then formally announced on 7 December 2020 by the UK Government. See, for information, <https://www.gov.uk/government /news/government-launches-independent-review-of-the-human-rights-act> accessed 18 December 2020.

alongside the doctrinal and socio-legal approaches which were used. Such further study could usefully add colour to the research in this thesis and help to explain where and why judges are willing to engage with unincorporated human rights instruments when making decisions. Thus, the preceding section sets out an agenda for further research, based on this thesis, which can help to inform understanding of how incorporation might secure economic, social and cultural rights in England and Wales. This is an area in which a great deal of work remains to be done.

In presenting this research, this thesis has demonstrated that incorporation of the European Convention of Human Rights has secured better judicial enforcement of human rights in England and Wales. Incorporation of the ECHR has allowed the courts to respond proactively to remedy breaches of individual rights, and has correlated with an improved track record before the ECtHR. By contrast, the unincorporated ICCPR has not been developed by the courts as a method of securing individual rights. Looking at the evidence presented it appears clear that incorporation of international human rights instruments secures significantly better enforcement of individual rights in the courts of England and Wales.

Appendix – Cases Mentioning the ICCPR

Case Name	Neutral Citation[1]	ICCPR Article[2]
Airedale NHS Trust v Bland	[1993] UKHL 17	7, 6, 17
R (on the application of Bateman & Anor) v Secretary of State for the Home Department	[1994] EWCA Civ 36	14
R v The Immigration Appeal Tribunal & Anor, ex p Rajendrakumar	[1995] EWCA Civ 16	4, 9
R v Ministry of Defence, ex p Smith	[1995] EWCA Civ 22	26
Lazarevic v Secretary of State for Home Department	[1997] EWCA Civ 1007	12
Fitzpatrick v Sterling Housing Association	[1997] EWCA Civ 2169	26
Commissioner of Police for the Metropolis and Others, ex p Pinochet	[1999] UKHL 17	7
HM Attorney-General v Guardian Newspapers Ltd	[1999] EWHC Admin 730	None
Horvath v Secretary of State for the Home Department	[1999] EWCA Civ 3026	2, 6, 12, 23, 26
Sepet & Another v Secretary of State for Home Department	[2001] EWCA Civ 681	8, 18
R v Lambert	[2001] UKHL 37	14
R (on the application of Saadi & Others) v Secretary of State for Home Department	[2001] EWCA Civ 1512	Optional Protocol 5

[1] Given that BAILII has retroactively applied neutral citations to many of these cases, those which are reported prior to 2001 may be given with a different citation elsewhere. The practice of apply neutral citations in all cases did not begin until 2001 for the House of Lord and Court of Appeal and until 2002 for the High Court.

[2] Where this column records "none" the ICCPR was referred to in general but no specific article was discussed.

R (on the application of Mullen) v Secretary of State for the Home Department	[2002] EWHC 230 (Admin)	14
Smeaton v Secretary of State for Health	[2002] EWHC 610 (Admin)	6
A, X and Y, & Others v Secretary of State for the Home Department	[2002] EWCA Civ 1502	3, 4, 9, 26
Antonio Mendoza v Ahmad Raja Ghaidan	[2002] EWCA Civ 1533	None
R (on the application of Abbasi & Another) v Secretary of State for Foreign & Commonwealth Affairs & Secretary of State for the Home Department	[2002] EWCA Civ 1598	2, 9
Williamson & Others v Secretary of State for Education and Employment	[2002] EWCA Civ 1926	7
Ullah v Special Adjudicator	[2002] EWCA Civ 1856	None
R (on the application of Taylor) v Secretary of State for the Home Department	[2002] EWHC 2761 (Admin)	14
R (on the application of Mullen) v Secretary of State for the Home Department	[2002] EWCA Civ 1882	9, 14
An Hospital NHS Trust v S & Others	[2003] EWHC 365 (Fam)	None
R (on the application of Sepet & Another) v Secretary of State for the Home Department	[2003] UKHL 15	8, 18
Coppard v Customs and Excise	[2003] EWCA Civ 511	14
European Roma Rights Centre & Others v Immigration Officer at Prague Airport & Another	[2003] EWCA Civ 666	12

Y v Attorney-General	[2003] EWHC 1462 (Ch)	14
Chagos Islanders v Attorney General, Her Majesty's British Indian Ocean Territory Commissioner	[2003] EWHC 2222 (QB)	12
N v Secretary of State for the Home Department	[2003] EWCA Civ 1369	None
Nadarajah v Secretary of State for the Home Department	[2003] EWCA Civ 1768	Optional Protocol
R (on the application of DT) v Secretary of State for Home Department	[2004] EWHC 13 (Admin)	10
Department of Economic Policy & Development of City of Moscow & Another v Bankers Trust Company & Another	[2004] EWCA Civ 314	*14*
Re McFarland (Northern Ireland)	[2004] UKHL 17	14
R (on the application of Mullen) v Secretary of State for the Home Department	[2004] UKHL 18	14
Campbell v MGN Ltd	[2004] UKHL 22	17
R (on the application of Ullah) v Special Adjudicator	[2004] UKHL 26	2
Lough & Another v First Secretary of State & Another	[2004] EWCA Civ 905	17
Independent Assessor v O'Brien & Others	[2004] EWCA Civ	14
R (on the application of Uttley) v Secretary of State for the Home Department	[2004] UKHL 38	15
A & Others v Secretary of State for the Home Department	[2004] EWCA Civ 1123	7

R (on the application of B & Others) v Secretary of State for the Foreign & Commonwealth Office	[2004] EWCA Civ 1344	7
Jones v Al-Mamlaka Al-Arabiya As Saudiya (The Kingdom of Saudi Arabia) Ministry of Interior & Another	[2004] EWCA Civ 1394	5, 7, 14
R (on the application of European Roma Rights Centre & Others) v Immigration Officer at Prague Airport & Another	[2004] UKHL 55	2, 26
R (on the application of Al Skeini & Others) v Secretary of State for Defence	[2004] EWHC 2911 (Admin)	2
A & Others v Secretary of State for the Home Department	[2004] UKHL 56	2, 3, 4, 25, 26
R (on the application of Murphy) v Secretary of State for the Home Department	[2005] EWHC 140 (Admin)	14
Deloitte & Touche LLP & Another v Dickson & Others	[2005] EWHC 721 (Ch)	17
R (on the application of Al-Jedda) v Secretary of State for Defence	[2005] EWHC 1809 (Admin)	9
A & Others v Secretary of State for the Home Department	[2005] UKHL 71	7
Amare v Secretary of State for the Home Department	[2005] EWCA Civ 1600	None
R (on the application of Al-Skeini & Others) v Secretary of State for Defence	[2005] EWCA Civ 1609	2
Januzi v Secretary of State for the Home Department & Others	[2006] UKHL 5	None
Secretary of State for Work and Pensions v. M	[2006] UKHL 11	26
R (on the application of Al-Jedda) v Secretary of State for Defence	[2006] EWCA Civ 327	9

R (on the application of Al Rawi & Others) v Secretary of State for Foreign & Commonwealth Affairs & Another	[2006] EWHC 972 (Admin)	7, 10
Secretary of State for the Home Department v K	[2006] UKHL 46	7, 23
EM (Lebanon) v Secretary of State for the Home Department	[2006] EWCA Civ 1531	2, 17, 24, 26
R (on the application of Clift) v Secretary of State for the Home Department	[2006] UKHL 54	26
R v F	[2007] EWCA Crim 243	1
R (on the application of AM (Cameroon)) v Asylum and Immigration Tribunal	[2007] EWCA Civ 131	None
R (on the application of Raissi) v Secretary of State for the Home Department	[2007] EWHC 243 (Admin)	14
O'Brien & Others v Independent Assessor	[2007] UKHL 10	14
Secretary of State for Defence v Al-Skeini & Others	[2007] UKHL 26	2, 5
R (on the application of Niazi & Others) v Secretary of State for the Home Department & Another	[2007] EWHC 1495 (Admin)	14
R (on the application of Clibery) v Secretary of State for the Home Department	[2007] EWHC 1855 (Admin)	14
EB (Ethiopia) v Secretary of State for the Home Department	[2007] EWCA Civ 809	12
R (on the application of Raissi) v Secretary of State for the Home Department	[2008] EWCA Civ 72	14
MA (Palestinian Territories) v Secretary of State for the Home Department	[2008] EWCA Civ 304	12

R (on the application of Corner House Research & Campaign Against Arms Trade) v Director of the Serious Fraud Office & Another	[2008] EWHC 714 (Admin)	6
Re Rottmann	[2008] EWHC 1794 (Ch)	14
BE (Iran) v Secretary of State for the Home Department	[2008] EWCA Civ 540	6, 7
Re B (Children)	[2008] UKHL 35	23
R (on the application of Bhatt Murphy (a firm)) v Independent Assessor	[2008] EWCA Civ 755	14
R (on the application of Harris) v Secretary of State for Justice	[2008] EWCA Civ 808	14
R (on the application of Baiai & Others) v Secretary of State for the Home Department	[2008] UKHL 53	23
MT (Palestinian Territories) v Secretary of State for the Home Department	[2008] EWCA Civ 1149	12
SH (Palestinian Territories) v Secretary of State for the Home Department	[2008] EWCA Civ 1150	12
R (on the application of Miller & Another) v Independent Assessor	[2008] EWHC 2758 (Admin)	14
R (on the application of Barclay & Others) v Secretary of State for Justice & Others	[2008] EWCA Civ 1319	25
R (on the application of Al-Saadoon & Another) v Secretary of State for Defence	[2008] EWHC 3098 (Admin)	6
R (on the application of Adams) v Secretary of State for Justice	[2009] EWHC 156 (Admin)	14
R (on the application of Siddall) v Secretary of State for Justice	[2009] EWHC 482 (Admin)	14

Brown (aka Vincent Bajinja) & Others v Government of Rwanda & Others	[2009] EWHC 770 (Admin)	14
R (on the application of Miller) v Independent Assessor	[2009] EWCA Civ 609	14
QD (Iraq) v Secretary of State for the Home Department	[2009] EWCA Civ 620	6, 7
Baranauskas v Ministry of Justice of the Republic of Lithuania	[2009] EWHC 1859 (Admin)	None
Re MA & Others (Children)	[2009] EWCA Civ 853	23
R (on the application of Bary & Another) v Secretary of State for the Home Department	[2009] EWHC 2068 (Admin)	7
R (on the application of Adams) v Secretary of State for Justice	[2009] EWCA Civ 1291	14
R (on the application of Barclay & Others) v Secretary of State for Justice & Others	[2009] UKSC 9	25
Quila & Another v Secretary of State for the Home Department	[2009] EWHC 3189 (Admin)	23
Lodhi v Secretary of State for the Home Department	[2010] EWHC 567 (Admin)	None
L'Oreal SA & Others v Bellure NV & Others	[2010] EWCA Civ 535	19
Al Jedda v Secretary of State for Defence	[2010] EWCA Civ 758	9, 14
R (on the application of TS) v Secretary of State for the Home Department	[2010] EWHC 2614 (Admin)	None
Quila & Others v Secretary of State for the Home Department & Others	[2010] EWCA Civ 1482	23
R (on the application of AO) v Secretary of State for the Home Department	[2011] EWHC 110 (Admin)	None
ZH (Tanzania) v Secretary of State for the Home Department	[2011] UKSC 4	None

Ahmed & Another v R	[2011] EWCA Crim 184	7
DS (Afghanistan) v Secretary of State for the Home Department	[2011] EWCA Civ 305	6, 7
R (on the application of Mansoor) v Secretary of State for the Home Department	[2011] EWHC 832 (Admin)	None
R (on the application of Adams) v Secretary of State for Justice	[2011] UKSC 18	14
R v Ahmed Ali & Others	[2011] EWCA Crim 1260	14
Jackson, Re Setting of Minimum Term an Application Under Criminal Justice Act 2003	[2011] EWHC 1628 (QB)	7, 15
R (on the application of Yameen) v Secretary of State for the Home Department	[2011] EWHC 2250 (Admin)	18
W v M & Others	[2011] EWHC 2443 (Fam)	6
R (on the application of Quila & Another) v Secretary of State for the Home Department	[2011] UKSC 45	23
R (on the application of Chapti & Others) v Secretary of State for the Home Department & Others	[2011] EWHC 3370 (Admin)	23
Young v Young	[2012] EWHC 138 (Fam)	12
R v Gul	[2012] EWCA Crim 280	52 (?)
R (on the application of ST Eritrea) v Secretary of State for the Home Department	[2012] UKSC 12	28

R (on the application of Essa) v Upper Tribunal (Immigration & Asylum Chamber) & Another	[2012] EWHC 1533 (QB)	10
W v M (TOLATA Proceedings: Anonymity)	[2012] EWHC 1679 (Fam)	14
RT (Zimbabwe) & Other v Secretary of State for the Home Department	[2012] UKSC 38	18, 19
R (on the application of Reilly & Another) v Secretary of State for Work and Pensions	[2012] EWHC 2292 (Admin)	8
AAM (A Child) v Secretary of State for the Home Department	[2012] EWHC 2567 (QB)	None
Mutua & Others v Foreign and Commonwealth Office	[2012] EWHC 2678 (QB)	None
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R (on the application of B & Another) v Secretary of State for the Home Department	[2013] EWHC 2281 (Admin)	None
R (on the application of MM) v Secretary of State for the Home Department	[2013] EWHC 1900 (Admin)	12
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R (on the application of Ali & Others) v Secretary of State for Justice	[2014] EWCA Civ 194	14
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Mohammed v Ministry of Defence & Others	[2014] EWHC 1369 (QB)	9
R (on the application of T & Another) v Secretary of State for the Home Department & Another	[2014] UKSC 35	14
R (on the application of Shah) v Secretary of State for the Home Department	[2014] EWHC 2192 (Admin)	None
R (on the application of Reilly & Another) v Secretary of State for Work and Pensions	[2014] EWHC 2182 (Admin)	None
R (on the application of MM & Others) v Secretary of State for the Home Department	[2014] EWCA Civ 985	None
KL v R	[2014] EWCA Crim 1729	7
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R (on the application of G) v Chief Constable of Surrey Police & Others	[2016] EWHC 295 (Admin)	14
R (on the applications of Hallam & Another) v Secretary of State for Justice	[2016] EWCA Civ 355	14
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R (on the application of AR) v Greater Manchester Police & Another	[2016] EWCA Civ 490	14
Secretary of State for the Home Department v ZAT & Others (Syria)	[2016] EWCA Civ 810	None

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R (on the application of Mandic-Bozic) v British Association for Counselling and Psychotherapy & Another	[2016] EWHC 3134 (Admin)	None
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